FiveCAP, Inc. ***and*** **General Teamsters Union Local No. 406, International Brotherhood of Teamsters, AFL–CIO.** Cases 7–CA–37182, 7–CA–37192, 7–CA–37296(1), 7–CA–37296(2), 7–CA–37296(3), 7–CA–37514, 7–CA–37581(1), 7–CA–37581(2), 7–CA–37581(3), 7–CA–37581(4), 7–CA–37581(5), 7–CA–37581(6), 7–CA–37629, 7–CA–37771, and 7–CA–37779

August 25, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On January 31, 1997, Administrative Law Judge Steven B. Fish issued the attached decision. The Respondent filed exceptions and a brief in support and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified below.[2]

1. A primary issue in this case is whether the Respondent is exempt from the Board's jurisdiction as a political subdivision. We agree with the judge that the Respondent is not exempt from the Board's jurisdiction, but only for the reasons set out below.

Section 2(2) of the Act provides in relevant part that "[t]he term 'employer' shall not include . . . any State or political subdivision thereof[.]" Under the Board's test as described in *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604–605 (1971), entities are exempt from the Board's jurisdiction as political subdivisions if they are "either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." There is no contention here that the Respondent was created directly by the State. Therefore, to constitute a political subdivision, the Respondent must be "administered by individuals who are responsible to public officials or to the general electorate." The Board will find that an entity is an exempt political subdivision if a majority of its board of directors "[is] responsible to public officials or to the general electorate." *Economic Security Corp.,* 299 NLRB 562, 565 (1990). See also *Woodbury County Community Action Agency*, 299 NLRB 554, 555 (1990).[3] Thus, to decide whether the Respondent is an exempt political subdivision, we must determine whether a majority of its board of directors is responsible to public officials or to the general electorate. Before addressing this issue, we will briefly set out the relevant facts.

The Respondent is a nonprofit corporation engaged in the operation of Head Start programs, energy assistance and housing programs, and meal assistance and related programs. The Respondent serves four counties in Michigan and has its principal office in Scottville, Michigan. As a nonprofit community action agency that receives federal funds pursuant to the Community Services Block Grant (CSBG) Act, the Respondent is required to have a board of directors with a tripartite structure, with one-third of its members elected public officials or their representatives, one-third chosen from the private sector, and one-third "persons chosen in accordance with democratic selection procedures adequate to assure that they are representatives of the poor in the area served[.]"[4] The State of Michigan incorporated this tripartite structure into law. Thus, Michigan Public Act 230, section 400.1111, requires that "[o]ne-third of the members" of the board of a nonprofit community action agency be chosen from each of these groups. Section 400.1111 also provides that "[c]onsumer representatives" (i.e., the representatives of the poor in the area served) "shall be selected through a democratic process[.]" The Respondent's bylaws also provide for a tripartite board structure, with the three sectors defined as public sector, private sector, and "group to be served." The Respondent's bylaws do not, however, provide that the representatives of the group to be served be selected in accordance with a democratic election procedure as required under Federal and State law.

The Respondent's bylaws merely require that to be a candidate to represent the group to be served on the board, an individual submit a petition to the board signed

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996), as modified in *Excel Container, Inc.,* 325 NLRB 17 (1997).

[3] While, as explained below, these cases were overruled in *Enrichment Services Program, Inc.*, 325 NLRB 818 (1998), the Board there adhered to the principle that "[f]or an entity to be deemed 'administered by' individuals responsible to public officials or to the general electorate, those individuals must constitute a majority of the board." Id. at 819 (footnote omitted).

[4] The Community Services Block Grant Act, 42 U.S.C. § 9904(c)(3) provides, in relevant part, that:

> each board will be selected by the community action agency or nonprofit private organization and constituted so as to assure that (i) one-third of the members of the board are elected public officials, currently holding office, or their representatives, except that if the number of elected officials reasonably available and willing to serve is less than one-third of the membership of the board, membership on the board of appointive public officials may be counted in meeting such one-third requirement; (ii) at least one-third of the members are persons chosen in accordance with democratic selection procedures adequate to assure that they are representative of the poor in the area served; and (iii) the remainder of the members are officials or members of business, industry, labor, religious, welfare, education, or other major groups and interests in the community[.]

by 20 residents of the county from the group to be served. The Respondent's bylaws also require that the board's nominating and credentials committee draw from such properly filed petitions to fill any vacancy on the board. In theory, if there were more candidates from the group to be served than board vacancies for that group, the board would vote to fill the vacancies from among the candidates whose petitions had been submitted for consideration. In fact, however, as Mary Trucks testified without contradiction, the number of petitions from the group to be served never exceeded the number of board vacancies for that group.

In asserting that it was a political subdivision of the State of Michigan and therefore exempt from the Board's jurisdiction, the Respondent argued to the judge that it was similar to the community action agencies which the Board found were exempt from its jurisdiction in *Woodbury,* supra, and *Economic Security Corp.,* supra, cases in which the entities at issue also received Federal funds pursuant to the CSBG Act and also had tripartite boards of directors. In those cases, the resolution of the issue of whether the employers were exempt political subdivisions depended, as here, on whether a majority of their boards of directors was responsible to public officials or to the general electorate. Since it was undisputed in each case that the one-third of the board composed of elected public officials were responsible to the general electorate and that the one-third of the board composed of community leaders was not responsible to public officials or to the general electorate, the determinative issue was whether representatives of the poor in the area served were responsible to the general electorate. See *Economic Security Corp.,* supra, 299 NLRB at 563; *Woodbury,* supra, 299 NLRB at 555. In finding that they were, the Board explained in *Economic Security Corp.,* supra, 299 NLRB at 563, that

> [since] the composition of the Employer's board of directors is established by both Federal and state statutes, including the requirement that one-third of the members be "representative of the poor" and be chosen in accordance with "democratic selection procedures[,]" [i]n our opinion, the Federal and state statutes envision an election by the poor of one-third of the members of the board, and we find that individuals so chosen are "responsible" by law "to the general electorate" within the meaning of *Hawkins County.*

Similarly, in *Woodbury,* the Board found the one-third of the board required to be elected by persons whose incomes were "at or below poverty level" was also responsible to the general electorate. In reaching this conclusion, the Board relied on its decision in *Economic Security Corp.,* supra, for the proposition that "[t]he *Hawkins County* phrase 'general electorate' has been broadly defined to encompass such limited groups of electors as those in Woodbury, Iowa." *Woodbury*, 299 NLRB at 555 fn. 8.

In the present case, the Respondent contended, in effect, that to be consistent with its decisions in *Economic Security Corp.,* supra, and *Woodbury,* supra, the Board was required to find that a majority of the Respondent's board of directors is responsible to the general electorate and that therefore the Respondent is an exempt political subdivision.

The judge, however, rejected this contention because he found that the Respondent's method of choosing board members from the group to be served was sufficiently different from that in *Woodbury* and *Economic Security Corp.* to require a contrary result. In this regard, the judge found that these board members were not democratically elected because they were chosen through a petition procedure which he found "inherently coercive"[5] and that therefore such representatives were not responsible to the general electorate within the meaning of *Hawkins County,* supra, and its progeny. Accordingly, the judge found that a majority of the Respondent's board was not "administered by individuals who are responsible to public officials or to the general electorate," and that therefore the Respondent was not an exempt political subdivision of the State of Michigan.

After the judge issued his decision in this case, the Board rendered a decision in *Enrichment Services Program, Inc.,* 325 NLRB 818 (1998), in which the Board reconsidered whether an entity which receives funds under the CSBG Act is an exempt political subdivision. In determining whether a majority of the board of such an entity was comprised of individuals responsible to public officials or to the general electorate, the Board framed the issue as "whether the one-third of the board required to be 'representative of the poor' [was] responsible to the general electorate." Id. at 819 (footnote omitted). Overruling *Woodbury*, supra, and *Economic Security Corp.*, supra, and all subsequent cases in which the Board had found that CSBG Act antipoverty service programs were exempt political subdivisions in circumstances where "'representative of the poor' members of the tripartite board were elected by limited groups of voters," the Board found that "individuals are responsible to the general electorate under *Hawkins County* only if the relevant electorate is *the same as that for general political elections*."[6] Id. at 820 and fn. 13 (footnote omitted) (emphasis added).

[5] The judge found that while the petitions were supposed to be circulated by the candidates themselves, the Respondent's employees at food distribution centers frequently circulated the petitions at times when the Respondent's clients received their discounted food. Since the Respondent took no steps to assure its clients that there was no connection between their signing the petitions and their receiving discounted food, the judge found that at least some of the clients would likely perceive that there was a connection between the two procedures. On this basis, he concluded that the method of obtaining signatures was inherently coercive.

[6] The Board went on to explain, however, that its holding was not inconsistent with the Board's decisions in *Salt River Project*, 231

Applying this standard to the facts of *Enrichment Services*, the Board found that the employer's directors who were "elected by the poor" were not "responsible . . . to the general electorate" within the meaning of the *Hawkins County* test because the electorate comprised only members of various low income neighborhoods, and such an electorate was not the same as the electorate for general political elections. 325 NLRB at 819–820. Accordingly, the Board found that the employer was not an exempt political subdivision because less than a majority of the employer's board was comprised of public officials or individuals responsible to the general electorate.

Applying the *Enrichment Services* analysis to the facts of this case, we find that the determinative issue here, as in *Enrichment Services*, is "whether the one-third of the board required to be 'representative of the poor' is responsible to the general electorate." *Enrichment Services*, 325 NLRB at 819. This issue need not detain us long. For, as the judge found, the Respondent's bylaws require that to be a candidate to represent the group to be served one must only submit a petition signed by 20 residents of the county from the group to be served. Since individuals chosen by such a procedure are not elected by an electorate that "is the same as that for general political elections,"[7] we find that they are not responsible to the general electorate under *Hawkins County*. Thus, since less than a majority of the Respondent's board is composed of public officials or individuals responsible to the general electorate, we find that the Respondent is not an exempt political subdivision and that it is an employer under Section 2(2) of the Act.

In another case involving the same Respondent currently pending review at the Board, Case 7–CA–39503, et al., in which Administrative Law Judge James L. Rose's decision (JD–201–98) issued December 17, 1998, the Respondent contended before the judge that it had amended its bylaws to provide for democratic election of the representatives of the group to be served as required in *Woodbury*, supra, and *Economic Security Corp.,* supra, and that it was therefore exempt from the Board's jurisdiction as a political subdivision. Applying the analysis set out in *Enrichment Services*, supra, however, the judge found that even after the amendment of its bylaws, the Respondent was still subject to the Board's jurisdiction because its bylaws, as amended, provided for election of the representatives of the poor by a limited group of voters, and therefore the one-third of the Respondent's board required to be representatives of the poor was not responsible to the general electorate as required under *Enrichment Services*, supra.

In its exceptions to the judge's decision in that case, the Respondent concedes, in effect, that the amendment of its bylaws is not sufficient to establish that it is an exempt political subdivision after *Enrichment Services*. Rather, the Respondent now contends that it is an exempt political subdivision because, like the entities found to be political subdivisions in *Salt River Project* and *Electrical District Number Two*, discussed above at footnote 6, other significant factors are present which render it an exempt political subdivision, i.e., (1) that the State of Michigan considers it to be a political subdivision; (2) that the public has access to its meetings and records; (3) that there is "some form of public accountability" such as the requirement that financial reports be made and be available to the public for inspection; (4) that it is exempt from most Federal and state taxes; and (5) that it is established by a petition filed with the county board of supervisors. For considerations of administrative economy, we shall address these issues here. For the following reasons, we find the Respondent's arguments to be without merit.

In support of its contentions that the State of Michigan regards it as a political subdivision and that it is required to allow the public access to its meetings and records, the Respondent asserts that the Michigan Open Meetings Act, which applies to "public bodies"—a term which the Respondent contends, in effect, is synonymous with the term "political subdivision"—applies to it and that under its provisions it is required to grant the public access to its meetings and records. We find this contention without merit because, even assuming, as the Respondent contends, that the term "public bodies" must be synonymous with the term "political subdivision," the Michigan Open Meetings Act does not by its own terms apply to community action agencies like the Respondent. Rather, section 14(1) of the Michigan Economic and Social Opportunity Act of 1981, the state law under which the Respondent operates, provides that community action agency meetings be conducted in compliance with the Michigan Open Meetings Act. Obviously, if the State of Michigan regarded the Respondent as a "public body" (i.e., a "political subdivision"), the Michigan Open Meetings Act would have applied by its own terms to non-

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NLRB 11 (1977), and *Electrical District Number Two,* 224 NLRB 904 (1976), cases in which the Board found that it did not have jurisdiction over special purpose districts created under State law to provide electricity to landowners in designated counties of a State although the electorate in those cases did not include all persons eligible to vote in general political elections. The *Enrichment Services* board distinguished these cases because it found that "other significant factors were present" in those cases which established that the entities at issue were political subdivisions:

> These entities, which were considered to be political subdivisions under state law, were created after the filing of an election petition with the county board of supervisors, and upon an election among the taxpaying property owners within the district's geographical borders. In addition, the entities had the power to levy taxes and to condemn private and public property. The Board relied on these factors in finding that these entities were exempt political subdivisions of the state in which they were created.

Enrichment Services, supra at 820 (footnotes omitted). In finding that the employer in *Enrichment Services* was not an exempt political subdivision, the Board there noted that such factors were not present in that case. Id.

[7] *Enrichment Services*, 325 NLRB at 820.

profit community action agencies such as the Respondent and the legislature would not have needed to include section 14(1) in the Michigan Economic and Social Opportunity Act. Further, the Economic and Social Opportunity Act itself does not describe a nonprofit corporation like the Respondent, i.e., one which has been designated as a community action agency, to be a political subdivision. In these circumstances, we find that the fact that the Respondent is required to hold open meetings pursuant to the Michigan Open Meetings Act does not establish that it is a political subdivision. Similarly, the fact that the Respondent is required to keep financial records and to make them available for public inspection signifies only that the Respondent is a recipient of public funds and that it is therefore required to account for those funds to the public. The mere receipt of public funds with the requirement that the Respondent account to the public for the spending of those funds, however, does not establish that the Respondent is a political subdivision.

As to the Respondent's contention that its exemption from most taxes evidences its status as a political subdivision, we find precisely the opposite. The Respondent concedes that it is a nonprofit corporation established under the laws of Michigan and that its tax exempt status is pursuant to 26 U.S.C. § 501(c)(3), which applies to nonprofit charitable entities. This exemption turns on the Respondent's nonprofit status, not its political subdivision status. The Board routinely exercises jurisdiction over other entities which are, like the Respondent, exempt from Federal taxes pursuant to § 501(c)(3). *Enrichment Services*, 325 NLRB at 820; *Concordia Electric Cooperative*, 315 NLRB 752, 755–756 (1994). We find that the Respondent's tax exemption under these circumstances does not support, and indeed tends to negate, a finding of political subdivision status. *Enrichment Services*, 325 NLRB at 820.

As to its contention that it must be considered a political subdivision because, as in *Salt River*, supra, it is established by a petition filed with a county board of supervisors, we find the facts in the present case readily distinguishable from those in *Salt River*. In *Salt River*, the State of Arizona had created by statute the procedures, including the filing of a petition with the county board of supervisors, for establishing an agricultural improvement district and, by acquiring such status, "securing . . . the rights, privileges, exemptions, and immunities granted political subdivisions of the State of Arizona[.]" Id. at 11. In the present case, by contrast, the Respondent must file a petition with a county board of supervisors to gain approval to serve as the community action agency in that county. But the Respondent's status as a community action agency does not transform this nonprofit corporation into a political subdivision, nor has the Respondent identified any provision of Michigan law which would suggest otherwise. Accordingly, we find without merit the Respondent's contention that the fact that it must file a petition with a county board of supervisors evidences its status as a political subdivison.

Finally, as noted above at footnote 6, the Board in *Enrichment Services* observed that in both *Salt River Project*, supra, and *Electrical District Number Two,* supra, there were other factors which the Board relied on in finding that the entities at issue there were political subdivisions, especially the power to levy taxes and to condemn private and public property. Such special factors are not present here. Accordingly, we find that the Respondent is not an exempt political subdivision on these bases also.

2. In section 12 of his decision, the judge found, inter alia, that the Respondent violated Section 8(a)(3) and (4) of the Act by refusing to recall David Monton, the crew leader in its weatherization department, and Arthur Burkel, a laborer in that department, "in August" 1995, i.e., on and after August 17, 1995.[8] The judge also found that Burkel's layoff from August 3 to 17 was unlawful. The Respondent excepts, inter alia, to the judge's finding that Burkel's layoff from August 3 to 17 was unlawful. For the reasons set out below, we adopt the judge's finding of this violation.

The Respondent hired Burkel as a laborer in its weatherization department in November 1994 to replace Monton whom the Respondent had promoted to crew leader in that department. They were under the overall supervision of Paula Clark, the weatherization director, and of Tom Belongia, a statutory employee, who was the field supervisor in the weatherization department. Dale Smith, also a statutory employee, was an inspector in the weatherization department. Clark resigned her position in April. After the Respondent discharged Smith and Belongia in May and June respectively—discharges which the judge found, and we agree, were unlawful—Monton and Burkel worked alone. In mid-July, however, Monton went out on sick leave due to an injury that he suffered at home. After Monton went out on sick leave, Burkel worked by himself for several days to finish up a project on which he and Monton had been working. On one of those days, Russell Pomeroy, the Respondent's fiscal officer, came to a jobsite to assist Burkel. Burkel, on 3 or 4 other days, rode around with Ron Knoblock, a subcontractor who had been hired by the Respondent to perform inspections for the weatherization department.

On August 3 Pomeroy handed Burkel a letter which stated that Burkel would be laid off due to "lack of work." The letter further stated: "The recent loss of your supervisor to an injury at home would mean that you would be working alone. For safety reasons this is not acceptable." (GC Exh. 63.) The letter concluded by stating that since the Respondent did not know when Monton would return to work, the layoff would extend

[8] All dates are in 1995 unless otherwise noted.

until further notice.[9] Subsequently, on August 16 Monton told Pomeroy that he had been cleared by his doctor to return to work. Pomeroy told him to report to work the next day, August 17. To Monton's inquiry of when Burkel would be recalled, Pomeroy replied that Burkel would be recalled as soon as jobs were preinspected. When Monton reported for work on August 17, however, Pomeroy told Monton that he had spoken to Mary Trucks, the Respondent's executive director, and it had been decided that it would be best if Monton not report for work until the new director was "up on his feet." Pomeroy estimated that Monton would be recalled in about a week. As of January 31, 1996, the date of their testimony in this case, Burkel and Monton testified that they had not received recall letters from the Respondent.[10]

For the reasons set out in section 12(b) of his decision, the judge found, and we agree, that the General Counsel has carried his burden under *Wright Line*[11] of showing that the Respondent's refusal to recall Monton and Burkel in August 1995, i.e., on and after August 17, was unlawfully motivated and that the Respondent failed to meet its burden in rebuttal. In his *Wright Line* analysis, the judge considered and rejected the Respondent's contention that the layoffs arising from its August 17 refusal to recall Monton and Burkel were caused by a lack of work. The judge also found the layoffs unlawful for "another reason," i.e., that but for the discharges of Smith and Belongia, Monton and Burkel would not have been laid off. In finding the layoffs of Monton and Burkel unlawful under this theory, the judge reasoned that since he had found that the discharges of Smith and Belongia were discriminatorily motivated, it followed that the layoffs of Monton and Burkel, which had been caused by these unlawful discharges, were also unlawful.

In reaching these conclusions, the judge specifically considered and rejected the Respondent's assertion in its August 3 letter to Burkel that the reason for his layoff on that date was "lack of work." As the judge observed, it was undisputed that there was plenty of work for the weatherization crew to perform, but the Respondent had chosen instead to assign all the work to subcontractors. The judge then characterized the next portion of the Respondent's August 3 letter (set out at footnote 9 above) as stating that there would be no one to supervise Burkel since Monton was out on sick leave. Thus, the judge found that Burkel's layoff on August 3, as well as the Respondent's failure to recall him on and after August 17, was unlawfully motivated.

The Respondent excepts to the judge's finding that the layoff of Burkel from August 3 to 17 was unlawful on the ground that the judge erred in finding that the asserted reason for the layoff was a lack of work for the weatherization department as a whole. Rather, the Respondent contends that the "lack of work" referred to in the letter is to the "work" of Burkel in particular. Thus, the Respondent asserts that no matter how much work there might be for the weatherization crew to perform, as explained in its August 3 letter, with the absence of Monton, his supervisor, it would have been unsafe for Burkel to work during this period because he would have had to work alone.

We find merit in this contention. We find that the Respondent has shown that it laid off Burkel on August 3 because of its legitimate concern for Burkel's safety if it permitted him to work alone. However, that does not end our analysis. Assuming that Burkel himself was not a target of discrimination on August 3, but was simply a "neutral" employee, we agree with the judge that Burkel's layoff was unlawful in any event. But for the prior unlawful discharges of Smith and Belongia, Burkel would not have had to work alone and therefore would not have been laid off from August 3 to 17. Thus, his layoff was the direct result of action that the Respondent clearly took for an unlawful motive. In this regard, Burkel's situation was not unlike that of employees who are discharged or otherwise disciplined as the result of a facially unlawful rule or a rule or change in policy which an employer institutes for unlawful reasons. Even if those employees are not direct targets of the employer's discrimination, disciplinary action taken against them is nevertheless unlawful because it is, in effect, "the fruit of the poisonous tree." See *Opryland Hotel*, 323 NLRB 723, 728–729 (1997) (disciplinary action taken pursuant to an unlawful no-solicitation rule is unlawful); *McClain of Georgia, Inc.,* 322 NLRB 367, 377 (1996) (discipline imposed as a result of a change in drug testing policy

[9] The full text of the August 3 letter (GC Exh. 63) states:

> Effective August 3, 1995 at 5:00 p.m. you will be laid-off due to lack of work.
>
> The recent loss of your supervisor to an injury at home would mean that you would be working alone. For safety reasons this is not acceptable.
>
> At this time we do not know when and if Dave will return to work. Until further notice you are on lay-off.

[10] Pomeroy testified, however, that the Respondent sent Monton and Burkel letters on January 26, 1996, requesting that they report to work on February 5, 1996. We leave to compliance the resolution of this issue.

[11] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983), overruled in part on other grounds, *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 276–278 (1994). As explained in *Regal Recycling, Inc.,* 329 NLRB 355, 356 (1999) (fns. omitted):

> Under the test set out in *Wright Line*, in order to establish that the Respondent unlawfully discharged the . . . employees based on their union activity, the General Counsel must show by a preponderance of the evidence that the protected activity was a motivating factor in the Respondent's decision to discharge. Thus, the General Counsel must show that the employees engaged in union activity, that the Respondent had knowledge of that activity, and that the Respondent demonstrated antiunion animus. Once the General Counsel has made the required showing, the burden shifts to the Respondent to demonstrate that it would have taken the same action even in the absence of the protected union activity.

implemented in retaliation for union activity is unlawful; "where a policy or rule is changed in retaliation for union activity by some employees, every individual affected by the changed policy is discriminated against, regardless of their individual union sentiments"). Similarly, the action taken against Burkel was the direct consequence of the discriminatory and unlawful layoffs of Smith and Belongia, and thus was itself unlawful.

Our dissenting colleague asserts that, by analogizing the Respondent's treatment of Burkel to the "fruit of the poisonous tree" principle, we have "abandoned" the *Wright Line* analysis. Applying a *Wright Line* analysis to Burkel's layoff, the Respondent could not prove that it would have laid him off even absent its discriminatory motive. The Respondent has not met this burden of proof simply by asserting that its true reason for laying off Burkel was nondiscriminatory, i.e., its safety concern that Burkel should not be working alone. For without its discriminatory motive, the Respondent would not have discharged Smith and Belongia in the first place, and it was their discharges that led to the layoff of Burkel. Thus, even under a *Wright Line* analysis, the Respondent has not met its burden, and its layoff of Burkel therefore violated Section 8(a)(3) and (1) of the Act. See *Hicks Oil & Hicksgas*, 293 NLRB 84, 85 (1989), enfd. 942 F.2d 1140 (7th Cir. 1991) ("[u]nder *Wright Line,* an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for imposing discipline against an employee, but must show by a preponderance of the evidence that the action would have taken place even without the protected conduct").

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Five-CAP, Inc., Scottville, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(j):

"(j) Within 14 days after service by the Region, post at its main office in Scottville, Michigan, and at all its other facilities in Michigan, copies of the attached notice marked "Appendix."[56] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1995."

2. Delete paragraph 2(l).

MEMBER BRAME, concurring in part and dissenting in part.

I agree with my colleagues that the Respondent is an employer under Section 2(2) of the Act. I also agree with my colleagues that the Respondent committed the unfair labor practices found by the administrative law judge,[1] except that I would not find that the Respondent violated Section 8(a)(3) and (1) by laying off weatherization department crewman Arthur Burkel from August 3 to 17, 1995.[2]

As explained by the judge, Tom Belongia, a statutory employee, was the field supervisor-inspector, and Dale Smith, also a statutory employee, was an inspector in the Respondent's weatherization department. David Monton was the crew leader and Burkel was the laborer on a two-person crew which performed the labor on the weatherization jobs at the homes of the Respondent's clients. After the Respondent discharged Smith and Belongia on May 4 and June 8, 1995 respectively,[3] Monton and Burkel continued to work until mid-July, when Monton went out on sick leave. After that, Burkel worked by himself to finish a job that he and Monton had been working on together. On one of these days, Russ Pomeroy, the Respondent's fiscal officer, came to the job site with a ladder to assist Burkel in completing the job. Burkel, on 3 or 4 days, rode around with Ron Knoblock, a subcontractor hired by the Respondent to perform inspection work. Finally, on August 3, Pomeroy handed Burkel a letter which stated that Burkel would be laid off due to lack of work. The letter also stated that it was not acceptable for safety reasons for Burkel to work alone in Monton's absence and that since the Respondent did not know when Monton would return to work, Burkel's layoff would extend until further notice.

The issue here is whether the Respondent's decision to lay off Burkel on August 3 was unlawfully motivated. In cases that turn on employer motivation, the Board applies the test set out in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied

[1] Since I agree with my colleagues that the Respondent violated Sec. 8(a)(1) by discharging employee Verna Fugere for engaging in protected concerted activity by participating in the circulation of a petition calling for the dismissal of Mary Trucks, the Respondent's executive director, and Russell Pomeroy, the Respondent's fiscal officer, I find it unnecessary to pass on whether Fugere's discharge was also violative of Sec. 8(a)(3) of the Act.

[2] Since I agree with my colleagues that the Respondent's refusal to recall Monton on August 17 and thereafter was unlawful, I also find that the Respondent's refusal to recall Burkel after that date was also unlawful because after that date the Respondent's legitimate reason for placing Burkel on layoff, i.e., its concern for his safety if he continued to work alone, would no longer apply.

[3] All dates hereafter refer to 1995.

455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983), overruled in part on other grounds *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 276–278 (1994).[4] Applying that analysis here, I agree with my colleagues that the Respondent has established that it laid off Burkel on August 3 for nondiscriminatory reasons, i.e., a legitimate concern for his safety if he were allowed to work alone. On this basis, in my view, the Respondent has successfully rebutted the General Counsel's prima facie showing that Burkel's layoff was unlawfully motivated. Since the Respondent has met its *Wright Line* burden, I would dismiss this allegation of the complaint.

My colleagues, however, having conceded that Burkel's layoff was for a lawful reason, i.e., a legitimate concern for his safety if he worked alone, reach out to find the violation under an alternate theory suggested by the judge, albeit under a different rationale, i.e., that since Burkel would not have been laid off on August 3 if Smith and Belongia had not previously been unlawfully discharged, the Respondent's unlawful motivation in discharging Smith and Belongia must extend to Burkel's layoff and thus renders that layoff also unlawful.[5]

In finding a violation under their alternate analysis, my colleagues assert that "[b]ut for the prior unlawful discharges of Smith and Belongia, Burkel would not have had to work alone and therefore would not have been laid off from August 3 to August 17." On the basis of this "but for" analysis, my colleagues find that since Burkel's August 3 layoff was a "direct result" of the Respondent's unlawfully motivated discharges of Smith and Belongia, Burkel's layoff was also unlawful because it was, in effect, "the fruit of the poisonous tree." For the following reasons, this analysis must fail.

Under my colleagues' analysis of the issue, there must be a "tree," i.e., some active policy or rule which, because it is either unlawful on its face or was unlawfully implemented, renders any disciplinary action also unlawful when the "primary justification" for the disciplinary action is based on the unlawful rule or policy.[6] In the present case, however, the primary justification for

[4] As explained in *Regal Recycling Inc.,* supra (footnotes omitted):

> Under the test set out in *Wright Line*, in order to establish that the Respondent unlawfully discharged [or laid off] . . . employees based on their union activity, the General Counsel must show by a preponderance of the evidence that the protected activity was a motivating factor in the Respondent's decision to discharge [or lay off]. Thus, the General Counsel must show that the employees engaged in union activity, that the Respondent had knowledge of that activity, and that the Respondent demonstrated antiunion animus. Once the General Counsel has made the required showing, the burden shifts to the Respondent to demonstrate that it would have taken the same action even in the absence of the protected union activity.

[5] In finding that the Respondent's unlawful motivation in discharging Smith and Belongia extended to Burkel's August 3 layoff, the judge relied on *Dawson Carbide Industries*, 273 NLRB 382 (1984), enfd. 782 F.2d 64 (6th Cir. 1986), and *Bay Corrugated Container*, 310 NLRB 450 (1993), enfd. mem.12 F.3d 213 (6th Cir. 1993). Those cases are, however, readily distinguishable.

In *Dawson Carbide Industries*, supra, the Board found that the respondent there had unlawfully laid off employee Carol Ann Kustosz because of her union activities. In order to disguise the unlawful nature of Kustosz' layoff, the respondent laid off Howard Churchwell, an employee who had not engaged in union activity but who had less seniority than Kustosz. In considering the issue of whether Churchwell's layoff was also unlawful as part of "an unlawful design" to discharge Kustosz, as the General Counsel argued, the judge explained that

> [t]he Board has held in the context of a union organizing drive that an employer's discharge of uncommitted, neutral, or inactive employees in order to "cover" or to facilitate discriminatory conduct against a targeted union-supporting employee or to discourage employee support for the union is violative of Section 8(a)(3) of the Act. . . . Necessarily, such findings depend on inferences arising from the surrounding circumstances as such employees, like Churchwell, are pawns in an unlawful design, rather than direct targets. Id. at 389.

Drawing the inference "that in Respondent's angry resolve to terminate Kustosz it unlawfully removed Churchwell to validate such action," the judge found that the respondent violated Sec. 8(a)(3) by laying off Churchwell. Id. at 389.

In *Bay Corrugated Container*, 310 NLRB 450, enfd. mem.12 F.3d 213 (6th Cir. 1993), the respondent discharged three employees assertedly for a printing error in which all three were involved. The Board found that the General Counsel had established a prima facie case under *Wright Line*, supra, that the respondent had discharged two of those employees, Rick Bartee and Don Moyur, because of their union activities. Relying on *Dawson Carbide Industries*, supra, the Board further found that the General Counsel had established a prima facie case that the respondent had discharged the third employee, Adam Gibson, who had not openly supported the union, in an effort to cover up its discriminatory discharges of Bartee and Moyur. *Bay Corrugated Container*, 310 NLRB at 451. As the Board there explained:

> Here, the Respondent would have had no justification for not terminating Gibson along with the two known union supporters for the printing error in which all were involved. Thus, we find that the General Counsel has shown that the protected conduct of Moyur and Bartee was a motivating factor in the Respondent's decision to discharge Gibson. Id.

Finding that the respondent failed to rebut the General Counsel's prima facie case, the Board found that the Respondent violated Sec. 8(a)(3) and (1) by discharging Gibson as well as Bartee and Moyur. Id. at 452.

In the present case, in contrast to the facts in *Dawson Carbide Industries* and *Bay Corrugated Container*, Burkel's August 3 layoff was not contemporaneous with Smith's and Belongia's discharges, but occurred 3 months after Smith's discharge and 2 months after Belongia's. It cannot be said, therefore, that Burkel was a "pawn" in some unlawfully motivated "design" that required that he be laid off to disguise the unlawful nature of Smith's and Belongia's discharges. Thus, the judge erred in finding the violation under this theory. In this regard, I note that my colleagues apparently agree that the judge's analysis of the issue is flawed because they have abandoned the "pawn" of the unlawful design theory advanced by the judge to find the violation under a different theory, i.e., that Burkel's layoff was unlawful because it was, in effect, "the fruit of the poisonous tree." As explained below, however, this theory is equally inapplicable here and therefore my colleagues err in finding a violation on this basis.

[6] As stated in *NLRB v. McCullough Environmental Services*, 5 F.3d 923, 931 fn. 9 (5th Cir. 1993):

> Because we find that the no-solicitation rule violates § 8(a)(1), we enforce that part of the NLRB's order directing McCullough to remove the reprimand from Bennett's file. *See* [*NLRB v.*] *Roney Plaza*, 597 F.2d [1046,] 1050–1051 [(5th Cir. 1979)] (stating that a disciplinary action cannot stand where the primary justification for it is based on an unlawful rule).

Burkel's layoff was not based on such an unlawful rule or policy. Thus, there is simply no "tree" here, frugivorous or otherwise, and therefore "the fruit of the poisonous tree" analogy must prove barren.

However, if my colleagues are, in reality, advancing a "fruit of the poisonous conduct" analysis, i.e., that Burkel's layoff was the "fruit" of Smith's and Belongia's unlawful discharges, that analysis must also fail. Assuming arguendo that such an analysis were appropriate here, it would only be valid if the "primary justification" for the alleged disciplinary action (Burkel's August 3 layoff) was the prior unlawful conduct (Smith's and Belongia's unlawful discharges), or, as my colleagues assert, if Burkel's layoff was the "direct result" of Smith's and Belongia's discharges (i.e., "but for" the unlawful discharges of Smith and Belongia, Burkel would not have been laid off).

In finding that the Respondent had met its *Wright Line* burden of showing that Burkel's layoff was not unlawfully motivated, however, my colleagues have already agreed that the primary justification for, the "but for" cause of, Burkel's layoff was not the discharges of Smith and Belongia at all, but rather concerns for Burkel's safety if he worked alone during Monton's absence. Having embraced this *Wright Line* analysis to find that Burkel's layoff was not unlawful,[7] my colleagues cannot then abandon it to find Burkel's layoff unlawful under an alternate theory of contradictory logic. Since Smith's and Belongia's unlawful discharges were neither the primary justification for nor the "but for" cause of Burkel's layoff, my colleagues' attempt to find a violation under their "fruit of the poisonous conduct" analysis must also fail. For all these reasons, I find my colleagues' arguments without merit. Accordingly, I would reverse the judge and find that the Respondent's August 3 layoff of Burkel was not unlawful.

A. Bradley Howell, Esq., for the General Counsel.

Terry J. Mroz, Esq. (McShane & Bowie, P.L.C.), of Grand Rapids, Michigan, and *Timothy J. Ryan, Esq. (Miller, Johnson, Snell & Cummiskey, P.L.C.),* of Grand Rapids, Michigan, for the Respondent.

[7] My colleagues contradict their own finding that Burkel's layoff was occasioned by a legitimate safety-related concern to assert that under a *Wright Line* analysis, "the Respondent could not prove that it would have laid [Burkel] off even absent its discriminatory motive." To reach this conclusion, my colleagues, in the guise of applying a *Wright Line* analysis, simply graft their metaphorical "fruit of the poisonous tree" analysis into the *Wright Line* context and hope that it survives scrutiny. It does not. For my colleagues' metaphorical "tree" cannot hide their own admission that the layoff at issue here was occasioned by a legitimate concern for Burkel's safety if he were permitted to work alone. Nor can it obscure the fact that by establishing that Burkel was laid off for a legitimate reason, the Respondent has satisfied its *Wright Line* burden.

DECISION

STATEMENT OF THE CASE

STEVEN B. FISH, Administrative Law Judge. Pursuant to various charges and amended charges filed by General Teamsters Union Local No. 406, International Brotherhood of Teamsters, AFL–CIO (the Union, or the Charging Party) in the above-entitled cases, the Director for Region 7 of the National Labor Relations Board (the Board) issued an order consolidating cases, fourth amended consolidated complaint and notice of hearing on December 4, 1995,[1] alleging that Five CAP, Incorporated (Respondent) violated Section 8(a)(1), (3), (4), and (5) of the Act.

The trial with respect to the allegations raised by the above-consolidated complaint was held before me in Cadillac and Grand Rapids, Michigan, on January 29 through February 2, and 4 through 8, 1996.

On June 5, 1996, I granted the request of Terry J. Mroz, Esq., to be removed as counsel for Respondent.

Subsequently, Timothy J. Ryan entered an appearance as attorney for respondent, and filed a supplemental brief on July 1, 1996, requesting that the complaint be dismissed for lack of statutory jurisdiction.

The General Counsel, after conducting an investigation of Respondent's contentions, requested that the record be reopened for the purposes of adducing evidence with respect to the jurisdictional issue. I granted the motion, and the reopened hearing was held on October 2, 1996.

Briefs have been filed by the General Counsel and Respondent, after the hearing was initially closed, and again after the close of the reopened hearing and all of the briefs have been carefully considered. Based upon my review of the entire record,[2] I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a nonprofit corporation with its office and principal place of business in Scottville, Michigan, as well as various other facilities throughout the counties of Manistee, Lake, Mason, and Newago, Michigan, where it is engaged in the operation of Head Start educational programs, energy assistance and housing programs, meal assistance programs, and related programs.

During the calendar year ending December 31, 1994, Respondent derived gross revenues in excess of $1 million and received Federal funds directly from outside the State of Michigan in excess of $50,000.

In its answer, as well as in the related representation case referred to below, Respondent admitted that it is and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

As noted above, however, Respondent after its change of counsel, asserted that the Board has no jurisdiction over the operations of Respondent, and claims that it is not an employer under Section 2(2) of the Act.

[1] All dates hereinafter are in 1995 unless otherwise indicated.

[2] While every apparent or nonapparent conflict in the evidence may not have been specifically resolved below, my findings are based on my examination of the entire record, my observation of the witnesses' demeanor while testifying, and my evaluation of the reliability of their testimony. Therefore, any testimony in the record which inconsistent with my findings is discredited.

The basis for Respondent's revised position is the contention that Respondent is a subdivision of the State of Michigan and therefore excluded form the definition of an employer under Section 2(2) of the Act. *Lima & Allen Community Action Commission*, 304 NLRB 888 (1991); *Albany County Opportunity,* 300 NLRB 886 (1990); *Woodbury Community Action Agency*, 299 NLRB 554 (1990); and *Economic Security Corp.*, 299 NLRB 562 (1990).

Respondent, similar to the agencies involved in the cases cited above, is a nonprofit community action agency that administers publicly funded antipoverty programs, and receives funding from state and Federal funds.

Federal law (The Community Services Block Grant Act) (CSBG) requires that the employer have a board of directors with a tripartite structure comprised of one-third of its members, elected public officials, or their representatives, one-third of its members officials or members of business, industry, labor, religious, welfare, education or other groups of interest in the community, and one-third of the members must be "persons chosen in accordance with democratic selection procedures adequate to assure that they are representatives of the poor in the area served."

The State of Michigan, in accordance with Federal law requirements, has incorporated this tripartite structure into its law, Michigan Public Act 230. The law provides that the community action agency shall establish a governing board of directors consisting of between 15 and 51 members, with one-third of the members from each of the areas set forth in the Federal statute. With respect to the one-third of its members in issue here, the State law provides as follows:

> One-third of the member shall be lwo income, elderly or handicapped consumers residing in the service area of the community action agency. Consumer representatives shall be selected through a democratic process pursuant to guidelines established by the department." [3]

The Michigan law also reflects that the legislature shall not be required to appropriate funds from the general fund for the continued performance of the provisions of the Act, if Federal funding as designated by the bureau and funded by the community development block grant is eliminated.

Respondent's bylaws attempt to comply with these State and Federal requirements by providing for a 24-member board of directors consisting of 8 members from each of three sectors.[4] The three sectors as defined in the bylaws are public sector, private sector, and "group to be served." The group to be served is further defined as "representaitves of the poor in each county." The bylaws further require that "a letter documenting such board member as representatives of the poor shall be on file at the corporation office and must be eligible for services when seated."

It is notable that the bylaws do not make any specific reference, as does both the Feceral and state laws to any requirement that the group to be served members be chosen in accordance with "democratic selection procedures" (Federal) or "selected through a democratic process" (State).

However, the bylaws do provide that the bylaws should not be interpreted or enforced to be in violation of/or in conflict with Michigan Public Law 30 or any other Federal law or agency having authority over the corporation.

The bylaws also set forth the procedure to be followed for applying for membership on the board from the group to be served sector, as well as the private sector. The bylaws state as follows:

> *Section 11—Petitioning the Board for Membership*
>
> Individual citizens for representatives of groups wishing representation on the Corporation Board shall petition their desire, with no less than twenty (20) signatures of residents of their county, for membership from the appropriate sector, Private or Group to be Served. Should a vacancy occur and at the regular annual elections such proper petitions shall be qualified nominations for membership. The Nominating and Credentials Committee Must draw from among such proper petitions to the appropriate sector to fill any vacancy and such proper petitioners must be nominees among candidates for election to Board membership, to the appropriate sector at the annual or special elections.
>
> To assure adequate representation, petitioners providing convincing arguments for a seat on the Board will be seated after compliance with the rest of this section. In order to assure PA 230-CSBG compliance, additional seats will be added to the other sectors as required, not to exceed a total Board size of 51. The By Laws will be amended accordingly. Petitions are to be sent to the Corporate Headquarters.

According to Respondent's executive director, Mary Trucks, the way that this nomination procedure is designed to work, is for a number of petitions to be submitted to the board for each vacant position. After the credentials committee decides whether the petitioners meet the eligibility standards, the board of directors' votes from among those deemed eligible. In that connection the bylaws provide that a meeting is deemed valid with a quorum present, consisting of 50 percent of the members.

However, Trucks also testified that in practice, there has never been a contest for a vacant seat on the board, and that the board has never been called upon to make a selection between more than one candidate. Also, according to Trucks, she could not recall the credentials committee ever rejecting any "group to be served" candidate for membership based on eligibility deficiencies.

The General Counsel adduced evidence from a number of former employees and board members of Respondent, which detailed actions of Respondent in general and Mary Trucks in particular, with respect to the selection process for "group to be served" members. The credible testimony of these various witnesses was largely undenied by Respondent and I conclude that such evidence establishes the following.

Paul Kirk had prior to January 1995 been serving on Respondent's board as a public sector representative. However, when he lost his position as county commissioner for Newago County, he therefore would not be entitled to a seat on the board on that basis.

Sometime in early January 1995 Mary Trucks handed to Mary Jo Klomp, Respondent's community support director, a petition for nomination to the board for Paul Kirk, with Kirk's name typed in at the top. At the time that Trucks gave the peti-

[3] "Department" is defined in the statute as the department of labor.

[4] The eight members from each sector are further divided into two members from each of the four counties served by Respondent.

tion to Klomp, she said to Respondent's fiscal director, Russ Pomeroy, "[D]on't you think he'd make a good board member?" Pomeroy agreed. Trucks instructed Klomp to give the petition to community support workers who were under her supervision, and to in turn, instruct the community support workers to obtain 20 signatures on the petition from clients when they came to the centers for food distribution.[5]

The petition when it was given to Klomp contained no signatures. Klomp complied with Trucks' instructions and gave the blank petition to community support worker Lori Murphy, along with the instructions from Trucks to obtain 20 signatures. Shortly, thereafter Murphy called Klomp, and told her that she had left the petition on a table at Bitely Center, but that the clients would not sign because they did not like Paul Kirk. Klomp reported to Trucks what Murphy had told her. Trucks told Klomp to tell Murphy to get those signatures, adding, "I know she can do it." Klomp in turn, reported her conversation with Trucks to Murphy.

Subsequently Murphy returned the petition to Klomp, with 20 signatures, all dated January 23, 1995.

Murphy did not inform Klomp where or how she had obtained the signatures. However, Klomp assumed that Murphy had obtained the necessary signatures at Respondent's senior center in White Cloud, which is also in Newago County, and which usually services 600 people to pick up food, as opposed to Bitely, which ordinarily has 120 individuals picking up food at that center.

During this same period of time, Klomp pursuant to direction from Respondent, gave petitions to Ann Walters, community support worker for Lake County, to distribute on behalf of incumbent board members Robert Williams and Bernice Culpepper, and to Norma Johnson, community support worker in Manistee County, to distribute on behalf of incumbent board member, Violet Beatty. Klomp instructed Walters and Johnson that Trucks had ordered that they obtain 20 signatures from clients at the food distribution centers in their respective counties. Klomp did not instruct any of the community support workers precisely what to say to clients at the time of their obtaining signatures. Nor did she instruct the employees to tell the clients that it was strictly voluntary for them to sign or that their signing had no connection with obtaining the food. Klomp gave no such instructions, since no such instructions were given to her by Trucks or any other official of Respondent.

However, Ann Walters, the community service worker for Lake County, testified that when she obtained signatures, pursuant to Klomp's direction, she would leave the petitions in the area where the clients would be picking up their food. A volunteer would explain to the clients that the petition was for nomination to the board of directors and they would be asked to sign.

At times Walters would be present when the clients would sign the petitions while getting their food. On those occasions, Walters explained to the clients that if they wished to sign the petition they could, but that they did not have to sign, and their signing had nothing to do with their obtaining their food. Walters told this to the clients on her own, without any instructions from any supervisors, because apparently at times that question had been asked by clients (i.e., whether there was any connection between signing the petitions and the obtaining of the food).

Walters obtained 20 signatures on petitions for Culpepper and Williams, and Johnson did the same for Beatty. These petitions along with a petition for Kirk, were presented to and approved by Respondent's credentials and nominating committee at a meeting on February 23, 1995.

On the same date, February 23, the board conducted its annual membership meeting. The minutes of the meeting indicate that six members were present, including Kirk, Beatty, and Culpepper, and four were absent, including Williams.[6] The minutes also reflect that the board, pursuant to motion, voted to approve the committee recommendations by a vote of 6 to 0. Thus, Culpepper, Kirk, and Beatty voted for themselves to be approved as board members.

Carol Griffin had been a volunteer at a facility of Respondent in Mason County. In 1988, she was asked by Norma Recobb, a community support worker, if she would be interested in serving on the board of directors. Griffin agreed. Recobb prepared and circulated a petition on Griffin's behalf at that time, and Griffin became a board member. In subsequent years, petitions on her behalf were circulated by Respondent's employees without Griffin ever requesting or even seeing these petitions.

Verna Fugere, became the community worker in Mason County starting in August 1988. During her employment there she was directed by either her supervisor (the community support director) or the executive secretary to Mary Trucks, on several occasions to obtain signatures on petitions for Carol Griffin, as well as for Ken Harper, both when they were incumbent members of the Board. Fugere was given petitions with only the names of the individuals filled in, and Fugere solicited the signatures at the time that clients came to food distribution centers to pick up their food. Fugere asked the individuals as they were picking up their orders if they would sign the petition to keep these people on the board. She did not inform them that there was no connection between the signing and the picking up of the food, nor did she tell them that there was a connection or that they had to sign. In fact, hundreds of people come through the center to pick up their food, and most of them were not interested in and did not sign the petitions. Eventually, Fugere was able to obtain the necessary 20 signatures for both candidates.

On June 28, 1993, Harper tendered his resignation as a board member. He was not replaced.

In early 1994 Fugere was given a petition by Trucks' executive secretary, and instructed to obtain 20 signatures on behalf of Griffin. Fugere had previously been told by Griffin that she no longer wanted to be a member, since she planned to move because of her husband's illness. Fugere after receiving the petition, confirmed Griffin's intentions about being on the board, and returned the petition without any signatures on it to Trucks' secretary, with an explanation that Griffin no longer wished to be a board member.

Shortly thereafter, Trucks called Fugere to her office. Trucks informed Fugere that it was not Fugere's place to make decisions for people on the board, and that if Griffin did not want to be on the board, she should contact Trucks directly.

[5] One of the programs that Respondent administers consists of the distribution of food at discount prices to low income clients at Respondent's facilities in the four county area.

[6] The minutes indicate that a quorom was present.

Trucks ordered Fugere to obtain the signatures on Griffin's behalf, notwithstanding Griffin's desires not to be a member.

Fugere complied with Trucks' instructions, and obtained 20 signatures on the petition for Griffin to be on the board from clients picking up their food. She returned the petition to Trucks' secretary.

Shortly thereafter, Fugere and Griffin were engaged in a telephone conversation primarily dealing with a food order of Griffin's. During this conversation Griffin complained to Fugere about being on the board, and made comments critical of Mary Trucks' conduct at these meetings. Trucks, who apparently had picked up the extension in her office, interrupted the conversation. Trucks criticized Griffin for speaking that way about the board, particularly considering all the good that Respondent had done for her and her family. Trucks added that if Griffin felt that way about the board, she did not have to be a board member anymore, and that Griffin would no longer be a board member. Trucks also told Griffin that she did not want to see her in the building anymore, and that she need not volunteer either. Griffin made no attempt to attend any further meetings after this conversation, since she was not interested in retaining her seat.[7]

It does not appear that Griffin's petition was submitted to the board or that the board took any action to remove Griffin. Since her term expired, she was simply not reappointed, nor has she been replaced as a board member.

Trucks did not substantially dispute any of the testimony set forth above, concerning her involvement in the petition process. She testified, however, that it is Respondent's policy to make petitions available at food distribution centers for any interested candidate, and that in some cases in the past, board candidates have circulated their own petitions. Trucks did not explain why she had ordered employees to obtain signatures for incumbent candidates, but she did testify that Respondent has consistently had difficulty in filling vacancies on the board, and that the board has obtained waivers from the State to allow some incumbent members to serve more than 10 years, which is contrary to state law. She further testified that she was interested in getting petitions signed and having a full board to "stay legal."

In connection with the issue of filling vacancies testimony was adduced concerning alleged efforts by Respondent to recruit candidates and to notify potential candidates of board openings. Mary Trucks testified that Respondent, prior to board elections, routinely posts at its centers a form, a blank copy of which was introduced into the record. The form announces that Respondent is seeking concerned low-income residents to serve on the board. The form also details the requirement for a petition to signed by 20 residents and adds that blank petitions are available at Respondent's county offices. Accord-ing to Trucks, these forms are maintained at county offices, and it is the responsibility of the county director to make sure that the forms are properly filled out and posted at Respondent's centers a month or two prior to the time that the nominating committee meets. Trucks further testified that either she or her secretary will tell the supervisor when an election is scheduled so that they can make sure that the form was posted. However, Trucks could not recall ever seeing such a notice posted. Nor did Respondent produce any copies of filled out forms that were allegedly posted at any of its centers. Moreover, Respondent adduced no testimony from any community support worker or director or anyone at all that they had ever seen a copy of this notice posted at any of Respondent's facilities. On the other hand, the General Counsel adduced testimony from Fugere, Walters, and Klomp that they had never seen such a notice posted at any of Respondent's facilities,[8] nor were they ever instructed to distribute or post such a form. In fact, none of them had ever seen such a form, prior to October 1996 when they were shown it during the testimony.

Further, Klomp who was a community support director, whose responsibility it was according to Trucks to make sure the form was distributed, denied ever being told that such was the case. Klomp also denied Trucks' testimony that the form was included in a job manual that she was given when she was first employed.

Klomp also denied that she had ever been informed by Trucks what the deadline for petitions was, or when and if there were vacancies on the board. Her only involvement in the process was as detailed above, instructions from Trucks to obtain signatures on the petitions and get them back as soon as possible.

Trucks further testified that it is the responsibility of staff members, particularly community support workers, to recruit candidates for board membership. However, Trucks admitted that she did not have time to monitor or make sure that employees fulfill this responsibility. While some corroboration of Trucks' testimony can be found in Griffin's testimony that she was asked by a community support worker if she was interested in becoming a board member, Respondent produced no other employee or supervisor to testify that it was part of the responsibility of employees to recruit new board members.

Once again, Fugere, Walters, and Klomp all emphatically deny ever being informed by anyone from Respondent that they were expected to recount or to solicit clients to become board members. They also deny that the subject ever came up at any training sessions or meetings of Respondent that they attend.

Additionally, Respondent distributes to clients a monthly newsletter, which details news and events concerning Respondent, including section entitled "Mark your calendar" which sets forth important dates and other announcements of interest to its clients. Trucks admits that Respondent has never made any reference to board elections in this newsletter, nor made any solicitation in the newsletter for clients to apply for membership on the board. Moreover although Respondent has placed ads in the newspaper for the purpose of soliciting employees for hire, it has not placed any notices in newspapers with respect to board elections or to solicit candidates for such positions.

There have been two vacancies in the Mason County "group to be served seats," which have not been filled since Griffin left the board in 1994. The roster of board members in 1995–1996 was comprised of six "groups to be served members, with two

[7] In fact, Trucks had no power to remove Griffin from the board. The bylaws provide that removal of board members must be voted on by the board and lists certain specified reasons as causes for removal. These causes include disloyalty to the agency, usurping authority of the executive director and dealing directly with agency staff, missing two meetings without excuse, and failure to attend board training.

[8] Walters was employed by Respondent from 1989–1996, Fugere from 1988–1995, and Klomp from October 1994 to May 1995.

vacancies in Mason County, four private sector members,[9] and six public sector members, with two vacancies.

Trucks also testified that Respondent sent a letter to its clients in Lake County, dated July 17, 1996, inviting them to community information, meeting in Baldwin, one of its facilities in that county. Trucks testified that this meeting was conducted, during which she explained Respondent's petition process, and encouraged them to serve as board members. Trucks also testified that Respondent plans to hold similar meetings in all counties in the future.

The first issue to be decided with respect to Respondent's assertion of lack of jurisdiction, is whether or not such claim has been raised in a timely fashion. While in certain instances, the Board will find that an assertion of lack of jurisdiction has been waived by a failure to raise such a contention in the representation case, *Ryder Student Transportation,* 297 NLRB 371, 372 (1989), where, as here, the issue is the Board's assertion of statutory jurisdiction, i.e., whether Respondent is an employer under Section 2(2) of the Act, such a contention may be raised any time. *Chelsea Catering Corp*., 309 NLRB 822 (1992); *International Total Services*, 270 NLRB 645 fn. 1 (1984); and *Anchortank, Inc.,* 233 NLRB 295 fn. 1 (1977).

Therefore, I conclude that Respondent has not waived its rights to contest jurisdiction either by its failure to raise the claim at the representation case or by admitting jurisdiction in its answer to the unfair practice proceeding here.[10]

Turning to the merits of Respondent's assertions, the issue to be determined is the applicability of the so-called *Hawkins County*[11] test to the operations of Respondent. In *Hawkins County*, the Supreme Court in reviewing a Board determination of whether an employer was "political subdivision" of a State, set forth a test for evaluating this issue, while quoting from the Board's brief in that case. "The Board . . . has limited the exemption for political subdivisions to entities that are either (1) credited directly by the State, so as to constitute departments or administrative arms of the Government, or (2) administered by individuals who are responsible to public officials or to the general electorate." 402 U.S. at 604–605.

It is significant to note that the phrase "administered by individuals who are responsible to . . . the general electorate" was the brief writer's paraphrase, and was not actual language from any previous Board case. See *Woodbury County*, supra at 556 fn. 3.

Nonetheless, the Board has followed this *Hawkins County* test in subsequent cases, including the four cases, cited by Respondent. *Woodbury County,* supra; *Lima,* supra*; Economic Security,* supra*;* and *Albany,* supra. In each of these cases, community action agencies engaged in operations similar to Respondent, and in fact with structures mandated by the same Federal statute, were found to have been administered by individuals who are public officials or who are responsible to the general electorate, and were therefore exempt political divisions of the various states in which they were located, and not employers within the meaning of Section 2(2) of the Act.

Here, there is no dispute that Respondent is a community action agency, which is mended by both Federal and state law to be governed by a tripartite board of directors, of which one-third must be from public sector, one-third from the private sector, and one-third consumers residing in the service area of the agency. It is also not contested that Respondent's bylaws and practice have adhered to these Federal and State requirements, since one-third of its members have been chosen from each of the sectors as required by the statutes as well as Respondent's bylaws.

Respondent argues that these facts are sufficient to establish that it is an exempt political subdivision of the State of Michigan, since a majority of its board is comprised of directors who are responsible to public officials or to the general electorate.

The General Counsel argues however that in order to meet the requirements in *Hawkins County* that Respondent is administered by individuals who are responsible to the general electorate, it must also be established that these individuals were selected by democratic procedures or processes.

Respondent, in response to this assertion, contends that since Respondent is required by State (and Federal) law to utilize democratic procedures to select its "consumer" or"group to be served,"[12] representatives, that it is not essential nor relevant to inquire into whether or not these representatives were in fact selected by democratic procedures or processes. *Crestline Memonal Hospital v. NLRB,* 668 F.2d 243, 245 (6th Cir. 1982) ([d]ecision on exemption depends on whether directors are responsible *by law* to the electorate).

I disagree.

I note that in *Woodbury County, Albany* and *Economic Secunty,* supra*,* cited by Respondent, the Board emphasized and detailed the elaborate and comprehensive election procedures that were utilized by the various agencies involved in selecting their consumer representatives. I also note that *Economic Secunty,* supra*,* states specifically, "In our opinion the Federal and state statutes envision *an election* by the poor of one-third of the members of the board, and we find that individuals, *so chosen* are 'responsible' by law 'to the general electorate' within the meaning of *Hawkins County."* Id. at 563 (emphasis added). While *Lima,* supra*,* does not refer to any elaborate election procedure utilized by the agency therein, the decision reflects that "representatives of the low income groups on the Employer's board of trustees *were selected* by a democratic process by their respective organizations. (Emphasis added.) In fact, the Board dealt specifically with the contention made by the Petitioner Union that notwithstanding the Employer's bylaws and the applicable laws requiring selection of representatives of the poor in accordance with democratic procedures, that in fact such representatives were not elected by democratic process.

Finally, I would also note *Concordia Electoc Cooperative,* 315 NLRB 752 (1994), where in the course of evaluating whether an electrical cooperative was an exempt political subdivision, the Board discussed its prior decisions such as *Woodbury* and *Economic Secunty,* supra*.* The Board concluded therein as follows: "Likewise, the Board's decisions in *Woodbury* and *Economic Security Corp.* emphasized that the exempt

[9] There were four vacancies for these positions.

[10] Whiel Respondent has not made a formal motion to mend its answer in the instant proceeding, I deem its motion to dismiss on the grounds of lack of jurisdiction to be an implicit request to amend its answer, which I shall grant.

[11] *NLRB v. Natural Gas Utility District of Hawkins County,* 402 U.S. 600, 604–605 (1971).

[12] I shall utilize the term consumer representatives rather than "group to be served" representatives in any subsequent discussion of this issue, since the state statute utilizes that term, and it is easier to use than "group to be served."

entity's governing board *was elected* using 'democratic selection procedures.'" Id. at 254 (emphasis added).

Respondent's citation of *Crestline,* supra, is not dispositive. There the court upheld the Board's decision of declining to find that an employer was a political subdivision based on its assertion that it was "responsible to the electorate," since all citizens of the city were eligible to vote for its board of directors. The court agreed with the Board's reasoning that the directors are not responsible *by law* to the electorate since no city or local laws govern the operations of the Hospital, and that the decision to allow all citizens to vote is voluntary and subject to change by the Hospital. This decision stands only for the proposition that the requirement of being "responsible to the electorate" must be mandated by law in order to qualify for the exemption. This is an obvious conclusion, since the basis for the exemption is the implicit understanding, that since the selection requirements are mandated by state law, that in effect the State is controlling how the entity is govemed.

However, the converse is not necessarily true. The case does not say that state law requirements as to how the Board is selected is enough in and of itself to establish exempt status. In my view, the other Board cases cited above, read in conjunction with *Crestline* makes it clear that in order to come within the political subdivision exemption, an Employer must (1) be mandated by state law to select directors who are "responsible to the general electorates," (which includes the requirement that they be chosen by democratic election procedures) and (2) have in fact utilized democratic election procedures to select its directors.

Indeed, any other conclusion would render any of the state requirements subject to the whims of the Employer. The state mandate to select directors by a democratic process is no different than the other requirements, such as the one-third, one-third ratio, or the necessity that a majority of the board members be either public sector or "responsible to the general electorate." Thus, if Respondent's argument is accepted, one would have to conclude that it does maker whether or not in fact Respondent complied with the required ratio or whether in fact a majority of the board members were from the public sector or consumers residing in the service area of the county served by Respondent. Moreover, it would also not matter whether or not for example all of the consumer representatives were appointed by the board or even by Mary Trucks herself. Clearly, it is relevant to consider whether these requirements were in fact complied with by Respondent, and it is also relevant to examine whether in fact Respondent chose its consumer respresentatives by democratic procedures or processes.

I shall, therefore, proceed to examine that question. It is highly questionable whether or not Respondent's procedure as outlined in its bylaws meets the test for establishing democratic procedures necessary to conclude that these representatives are responsible to the general electorate. Initially it is noted, that unlike the bylaws of the agencies in *Economic Secunty, Woodbury, Albany,* and *Lima,* which specifically incorporated state law requirements that consumer representatives be selected by democratic processes or procedures, Respondent's bylaws do not make any specific reference to such democratic procedures or processes for selection of its representatives. Thus, in this connection Respondent's bylaws require only that one-third of the representatives must be representatives of the poor, and that the candidate must submit a petition signed by 20 residents of the county from the group to be served sector.

Sensitive to the failure of Respondent's bylaws to require democratic procedures or processes, Respondent points to the bylaws provision which states that the bylaws shall not be interpreted or enforced as to be in violation and/or conflict with policies, procedures, and regulations of the Michigan statute or Federal agencies. However, I do not believe that this "savings" clause is sufficiently specific to require compliance with the State mandate for selection of consumer representatives through a democratic process.

In any event, regardless of whether or not this clause is found to incorporate the democratic process requirement, I am not persuaded that Respondent's attempt to comply with this requirement has succeeded.

Thus, I note that no election day any consumers is contemplated by Respondent's procedures, other than the two consumer representatives per county on the board, who vote to seat the prospective members, or choose amongst the candidates if there are more than one vacancy. Moreover, the petition process employed by Respondent, requires only twenty signatures out of the hundreds of consumers in each county served by Respondent. I hardly think that such a procedure can be construed as sufficient to qualify the candidate so chosen as responsible to the general electorate or as a "democratic procedure."

However, regardless of whether the procedure itself can be considered democratic, the way that Respondent has in fact enforced and applied this procedure convinces me that the consumer representatives of Respondent have not been selected by a democratic process.

The credible evidence demonstrates that Respondent made little if any efforts to comply with the state requirement for a democratic process in its selection procedures. In that connection, to the extent that credibility issues existed as between witnesses called by the General Counsel and Mary Trucks, I credit the former witnesses. Thus, Klomp, Fugere, Walters, and Griffin produced mutually corroborative and believable testimony concerning the matters that they recounted. Trucks on the other hand, was the sole witness produced by Respondent in the reopened proceeding, and no corroborating witnesses or evidence was produced by Respondent in support of her testimony.

The main area of dispute between the witnesses, dealt with Trucks' assertion that Respondent regularly posted a notice at all relevant centers, 2 months before the annual board meeting where candidates for membership are chosen, announcing the vacancy on the board, and encouraging prospective candidates to apply. While Respondent, through Trucks introduced a blank copy of the form, which she claims was regularly posted, Respondent was unable to produce a filled out or dated copy of such a form, or any supervisor, employee, board member, or any witness who saw such a form posted or was even aware of the existence of such a form. Indeed, even Trucks herself admitted that she never actually saw such a form posted at any of Respondent's centers.

In these circumstances, I credit the mutually corroborative testimony of Fugere, Walters, and former supervisor, Klomp, that they never saw or were aware of such a form, and conclude that Respondent has not established that such a form was ever posted at Respondent's centers or otherwise distributed to consumers in the counties served by Respondent.

Moreover, Respondent adduced no probative evidence of any other significant effort to notify or recruit prospective can-

didates for board membership. I find it most significant in this regard, Respondent's inexplicable and unexplained failure to provide in its monthly newsletter, where it includes a section entitled "Mark Your Calendars," a notification of the pending board meetings wherein candidates for membership are to be selected, and an encouragement to prospective candidates to apply.

While Trucks also testified that Respondent's staff members and supervisors are instructed to recruit potential board members, this testimony is refuted by the mutually corroborative denials of Fugere, Walters, and Klomp, that they were ever instructed by Respondent to do so. While Trucks' testimony did receive some support from Griffin, who conceded that she had been asked by a staff member if she was interested in becoming a staff member, this corroboration is insufficient to establish Trucks' contention that all employees were regularly instructed to encourage consumers to apply for board membership. I find it significant in this regard, the failure of Respondent to produce any written memo or document to staff members indicating that they were expected to recruit or encourage applicants for board membership.

Respondent also in this connection points to its new recruitment program as exemplified by its July letter and meeting with consumers in Lake County, wherein Trucks testified that she explained the eligibility requirements for board membership and encouraged those present to apply. However, since this meeting was both scheduled and held in July 1996 after Respondent had made its assertion concerning jurisdiction, I conclude in agreement with the General Counsel that this action was taken in contemplation of litigation and cannot be considered as significant, particularly, since Respondent never held such meetings in the past, even in Mason County where it had two vacancies for over 2 years.

Even more disturbing than Respondent's failure to properly notify consumers of the procedures to apply for board membership, is the evidence of involvement of Respondent in general, and Trucks in particular in the allegedly "democratic" selection process of submitting petitions.

Thus, the evidence discloses that the petitions that Respondent relies on to select board members, and which are supposed to be circulated by the candidates themselves, are in fact frequently circulated by Respondent's employees at food distribution centers at the time that the clients receive their discounted food. While as Respondent argues, no evidence was presented that any consumers were coerced into signing these petitions, the evidence also discloses that Respondent took no steps to ensure that consumers were assured that there was no connection between their signing the petition and their receipt of discounted food. It seems to me that such a system of obtaining signatures is inherently coercive. When an employee of Respondent requests that a consumer sign the petition at the same time that they receive food, without a clear explanation that there is no connection between the two events, it is reasonable to conclude that at least some of the consumers would be likely to perceive that such a connection was indeed present. I do not believe that this type of a procedure can be construed as part of a "democratic" process, and it seriously hinders any contention that board members selected on the basis of such petitions are "responsible to the general electorate."

Moreover, the credited evidence of the personal involvement of Mary Trucks in the selection of board members Paul Kirk and Carol Griffin further reinforces this conclusion. Thus, not only did Respondent order Klomp to obtain the necessary signatures for the candidacy of Kirk from consumers, but when it was reported by Murphy to Klomp that clients did not want to sign a petition for Kirk because they did not like him, Trucks insisted that Klomp tell Murphy that she, Trucks, knew that Murphy could get the signatures. This conduct by Trucks hardly bespeaks of democratic procedures or processes.

Similarly, Trucks insisted that Fugere obtain signatures on behalf of Griffin, even where Griffin had informed Fugere that she was no longer interested in being a board member. However, after Trucks heard Griffin criticize the board in general, and Trucks in particular, Trucks demanded that Griffin no longer appear at Respondent's premises and that in effect her services as board member were no longer required.

This evidence, as well as other instances where Respondent ordered employees to obtain signatures generally for incumbent board members are also contrary to any reasonable construction of democratic processes.

While Trucks seems to be attempting to justify Respondent's excessive involvement in the petition process, by asserting that she and it were merely attempting to secure compliance with statutory mandates with respect to the number of board members, I find such an explanation unconvincing. I do not quarrel with Trucks' testimony that Respondent has consistently had difficulty in filling board vacancies, and in fact that it has never had a contested election for such a vacancy. However, I attribute that difficulty in substantial part to Respondent's own failure to adequately inform and encourage potential candidates to apply for these vacancies, as I have outlined above. Even if that were not so, it would not justify Respondent's excessive and inherently undemocratic involvement in the petition process as described above.

Respondent places substantial reliance on the Board's decision in *Lima,* supra*,* where the Board found that an agency similar in structure to Respondent, and subject to similar statutory requirements was an exempt political subdivision of the State. As Respondent correctly observes, the Board made such a finding notwithstanding the fact that no general election was conducted by the employer therein to select board members. Nor did the evidence therein establish elaborate election procedures and notifications as in *Albany, Economic Secunty,* and *Woodbury.* The procedure utilized by the Employer in *Lima* was to permit community organizations to select representatives from their organizations to represent the low-income group sector on the agency's board. Respondent also correctly notes that no evidence was adduced in that case of any widespread notice given to people of their right to be considered for positions on the board. Thus, based on the above, Respondent argues that Respondent's procedures and policies are in fact more democratic than the agency in *Lima,* and that therefore Respondent should also be found to be an exempt political subdivision of that State.

However, Respondent ignores crucial findings and conclusions that were made by the Board in *Lima.* The Board relied on the testimony of *Lima's* executive director that its personnel membership committee had regularly exercised its responsibility to assure that the representatives of the poor "were selected by a democratic process."[13] The Board further observed that the

[13] I once again note that the bylaws of the agency in *Lima,* unlike here, specifically require representatives of the poor be selected by a democratic election process.

"record contains no evidence to the contrary, i.e., that the representatives of the poor were in fact not selected by such a process."

Therefore, the Board made a finding that based on the unrebutted testimony of the executive director, that the low-income members, although selected by community organizations, were chosen by a democratic process. While the record in *Lima,* apparently did not reflect the specifics of the democratic process utilized by the community organizations, the Board credited the conclusionary, but unrefuted testimony that such procedures were followed. Moreover, the Board noted that no contrary evidence was presented, unlike here, where substantial evidence was adduced, as outlined above that the consumer representatives for Respondent, "were in fact not selected by such a process." *Lima*, supra at 889.

Finally, Respondent argues that the Board's jurisdiction cannot be dependent on factors which can change at any time. Thus, Respondent asserts that since any finding that is made that Respondent has employed insufficiently democratic procedures could easily be changed by Respondent by changing its bylaws and/or by employing more efficient notification policies, the Board could easily be divested of jurisdiction by the next election cycle. Respondent claims, therefore, that stable labor relations would not be promoted if an employer could move in and out of the Board's jurisdiction so easily, and that "it is ludicrous to claim that the Board's statutory jurisdiction is dependent upon factors which can be so fleeting."

While Respondent does have a point, the same argument can be made in numerous other situations where changes in how an employer operates its business can bring it in and out of jurisdiction, or change a unit determination by the Board. However, the Board decides cases on the facts before it at the time, and whether Respondent is to be considered an exempt political subdivision of the State of Michigan, must be determined by considering the facts present on this record.

I therefore conclude, based on the foregoing analysis and authorities, that since Respondent does not select its consumer representatives by using democratic processes or procedures, such representatives are not responsible to the general electorate within the meaning of *Hawkins County* and its progeny. Therefore, since a majority of its board does not consist of public officials or consumer representatives which are responsible to the general electorate, Respondent is not a political subdivision of the State of Michigan, and therefore is an employer within the meaning of Section 2(2) of the Act.

While I have rejected Respondent's argument concerning the ease of Respondent divesting the Board of jurisdiction, I do think that the Board could consider such a contention in assessing whether or not to continue to adhere to the "second prong" of *Hawkins County,* supra*,* as a basis for deciding statutory jurisdiction. I would note that the Board has recently reversed or modified previous decisions to decline jurisdiction, based on a reevaluation of applicable precedent. *Management Training Corp.,* 317 NLRB 1355 (1995); and *Concordia Electric,* supra*.*

I would note in this regard the dissenting opinion by Chairman Stephens in *Woodbury,* supra*,* which he adhered to in *Albany,* supra*,* which in my view lays out a persuasive and cogent rationale for reversing prior precedent. Thus, as this.opinion points out, *Hawkins County* does not require the Board to adhere to the position that political exemption is warranted where the majority of the board is "responsible to the general electorate." Indeed as noted therein, that statement of Board law as outlined in *Hawkins County* did not come from any Board case, but only from the brief of the Board attomey.

Frankly, while I have examined much of the caselaw on this subject, I can find no cogent rationale set forth for exempting an otherwise private employer from the Board's jurisdiction, merely because a majority of its board members are, as mandated by state law, "responsible to the general electorate." I would note that state statutes also mandates that one-third of the governing board be representatives of the private sector, including representatives of business, labor, and civil organizations. Yet the representatives of these organizations, although similarly mandated by the State, are not considered significant in establishing exempt status.

Thus, the consumer or representatives of the poor portion of the board it seems to me are little more connected to the State than the private sector representatives. The only distinction between these two groups, seem to be that the consumers are deemed responsible to the general electorate, because they are selected by a mandated democratic procedures. I find that a rather slender reed to be the determinative factor in defining an employer and thereby establishing the presence or absence of Board jurisdiction.

This is especially true, since as Member Stephens observed in *Woodbury*, the mandate for the State to elect a portion of its board by using democratic procedures, "merely reflects the State's compliance with Federal restrictions on the use of funds provided to the States under the Community Services Block Grant Act." Id. at 556. Since as also noted by Member Stephens, the "exemption for political subdivisions of a State "has as its ultimate basis in . . . Tenth Amendment considerations of state sovereignty and the Eleventh Amendment grant of judicial immunity to the states," Id. at 559, citing *Crestline,* supra at 246 fn. 1, there is little rationale for finding such an impingement on state sovereignty by asserting Board jurisdiction, where Federal requirements already mandate the State's composition of its board.

Indeed the Board has recently recognized this argument in *Concordia,* supra*,* where it held that the 2(2) exemption "was intended to exempt only entities which were closely identified with state government bodies." 315 NLRB at 754. The Board then cited the Supreme Court's opinion in *Hawkins County* that "Congress enacted the Section 2(2) exemption to except from Board cognizance the labor relations of federal, state and municipal *govemments* since government employees did not usually enjoy the right to strike. *Hawkins County,* supra at 609 (emphasis added).

Thus, current Board law finds that an employer like Respondent, would be "closely identified" with the State of Michigan, merely because a majority of its board as mandated by the State is "responsible to the general electorate" (i.e., where part of this majority consists of consumer representative who are elected democratically).

I find this proposition of dubious validity and agree with Member Stephens when he observes, "I cannot accept this proposition that Iowa's incorporation of this Federal requirement into State law erects a state sovereignty barrier against a Federal agency's assertion of jurisdiction over an otherwise private corporation." 299 NLRB at 560.

It is also significant to note, as again set forth by Member Stephens that Congress in the Block Grant Statute itself distinguished between "political subdivisions of the State," and nonprofit private community organizations, thereby giving some

indication that Congress did not view these community organizations as political subdivisions of the State.

I am also of the opinion that pertinent in this instance is Respondent's argument that assertion of jurisdiction here would allow an employer to divest itself of jurisdiction by simply changing its election procedures, and that this does not promote stability in labor relations. While I rejected this argument as a defense to Respondent's failure to follow democratic procedures, I do believe that this problem is another reason for the Board to reconsider its prior precedent. Thus, current law requires an evaluation of democratic processes employed by the employing agency. As Respondent argues, if an employer changes its election procedures and then easily divests itself of jurisdiction of the Board, which is not a result that promotes stability in labor relations matters. Moreover, it requires the Board to delve into, as I have done above, the issue of how democratic a procedure the agency utilizes in its selection process for board membership. This is primarily a political question, and is not an issue which I believe the Board's expertise in labor matters would be of much value, and is an area which I believe the Board should not be involved in evaluating.

Accordingly, for the above reasons, I would urge the Board to reconsider its prior interpretation of *Hawkins County* as reflected in Member Stephens' dissent in *Woodbury*[14] and assert jurisdiction on that basis. However, as I have noted above, even under current Board law, Respondent's board is not comprised of a majority of members who are responsible to the general electorate (since the consumer representatives were not selected democratically), and is an employer under Section 2(2) of the Act.

It is also admitted and I so find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS AND ANALYSIS

A. The Representation Case

In the fall of 1994 the Union began its organizational campaign amongst Respondent's employees. On January 20, 1995, the Union filed a representation petition in Case 7–RC–20509 seeking to represent Respondent's employees at its various facilities in the four counties of Michigan. A representation hearing was thereafter held with respect to this petition on February 10, 13, and 14.

Prior to the hearing, 13 employees of Respondent were subpoened by the Union to testify at the hearing. These employees included Thomas Belongia, Carolyn Burba, Karla Clegg, Florence Feliczak, Verna Frigure, Bruce Kent, Melissa Kukla, Amanda Lange, David Monton, Dabe Smith, Marva Taylor, Julie Wiegard, and Melissa Larson-Anderson.

Belongia Fugere, Kukla, Monton, Smith, Burba, and Taylor were called as witnesses by and testified on behalf of the Union. Lange and Anderson attended the hearing, but were not called to testify.

While the parties were in agreement with respect to the inclusion and exclusion of several categories and classifications of employees in defining an appropriate unit, there was disagreement concerning a number of classifications, such as teachers, head cooks, crew leaders, and pre and postinspectors in the weatherization department, county community support workers, program information specialists, and three categories of coordinators.[15]

In this connection, Respondent contended that all of the above employees were either supervisors and/or managerial employees and should be excluded from the unit. The Union urged that all of these categories of employees were neither supervisors nor managerial, should be included in the unit, and presented the above-named employees as witnesses to testify in support of the Union's position in that regard.

On March 31 the Regional Director issued a Decision and Direction of Election, in which he found that with the exception of the coordinators positions, Respondent had not established their supervisory or managerial status, and concluded that these employees should be included in the unit. He found that the coordinators were supervisors, and excluded these categories from the appropriate unit.

The decision therefore ordered an election in the following appropriate unit:

> All full-time and regular part-time teacher aides, weatherization laborers, bus drivers, clerks, kitchen aides, drivers for the Tasty Meals program, assistant cooks, program information specialists, county community support service workers, field supervisors/pre-inspectors, post inspectors, crew leaders, head cooks, Head Start teachers and assistant community workers employed by the Respondent at its facilities in Lake, Manistee, Mason and Newago counties, Michigan; but excluding executive directors, Mason County Director for Head Start, Head Start head teachers, fiscal officers, community support directors, weatherization directors, Head Start administrative assistants, fiscal clerks, Head Start parent education coordinators, Head Start disability service coordinators, guards and supervisors as defined in the Act.

Pursuant thereto, the election was held on April 28. Marva Taylor and Dale Smith acted as observers for the Union at the election. The results were 38 votes for the Union, 2 no votes, and 23 challenges, which were not determinative of the election. Accordingly on May 8, a Certification of Representative was issued certifying the Union as the representative of Respondent's employees in the unit found appropriate.

B. Respondent's Supervisory Structure

At the apex of Respondent's supervisory structure was and is May Trucks its executive director/head start director, who operates out of the main office in Scottville and oversees the general operation of all of Respondent's programs in the four-county area. Directly below Trucks in the administrative hierarchy are or were Melba White, head start administrative assistant, Russell Pomeroy, fiscal officer, and Paula Clark, weatherization director, who also works or worked out of the Scottville office.

At its various locations, Respondent employs or employed community support directors, including Lisa Stankowski and Mary Jo Klomp, as well as head teachers, including LuAnn McCraken, April Foley, and Sandra Rotzein.

It is undisputed that all of the above named individuals are or were during the time of their employment with Respondent,

[14] I would also cite Member Oviatt's dissent in *Economic Security,* supra, where in citing the Supreme Court's opinion in *Hawkins County,* urged that board members cannot be considered responsible to the "general electorates," since they are subject to removal only by the board, and cannot be removed by the electorate.

[15] These employees were designated as education parent coordinator, health service coordinator, and disability services coordinator.

supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent, within the meaning of Section 2(13) of the Act.

C. The Alleged Violations of Section 8(A)(1) of the Act and Expressions of Animus

1. Facts

In early January, on a day that the Union was distributing cards, and holding union signs about the Union outside Respondent's office, Belongia testified that he was called into Trucks' office. According to Belongia, Trucks asked him to close the door, and inquired if he had heard about the Union? She asked him other questions about the Union, including who had started the Union? Belongia contends that at the end of the conversation, Trucks informed Belongia that "if the Union was voted in, she would just fire everybody, that she had done it once, and she can do it again."

While Trucks made a general denial that she made any threats to either terminate or discipline employees if they supported the Union, she gave no testimony either specifically denying the statements attributed to her by Belongia, nor providing a different version of this alleged conversation.

Amanda Lange testified that sometime in January she had a conversation with Head Teacher Sandra Rotzien, who reported to Lange that she had just come from a head teacher's meeting. Rotzien told Lange that the employees should watch out who they tell that they are in support of a Union, because if it gets back to the office, "there might be trouble."

Although Rotzien testified on behalf of Respondent on other matters, she did not deny making the above-described remarks, nor did she furnish any testimony concerning such a conversation with Lange. Rotzien did testify however that neither Trucks, nor any member of management ever said anything to her that employees who supported, voted, or testified for the Union would be fired.

Lange also testified that after she was subpoened to testify by the Union at the representation hearing, about a week prior to the hearing, she notified Rotzien and Trucks about it. Lange asserts that she called Trucks on the phone and told her that she had been subpoened by the Union to go to court. Trucks allegedly informed Lange that she must have signed a card and was a supporter of the Union if she was being subpoened by the Union.

Trucks specifically denied making the above remarks to Lange, and added that she never had a conversation with Lange and did not know who Lange was until someone told her.

David Monton testified that in February, shortly before the representation hearing, Weatherization Director Paula Clark told him that Mary Trucks had told her (Clark) that "anybody who voted in the Union would be eliminated in one year." Similarly, Art Burkel testified that in late January, Clark told him that Mary Trucks always got her way and people got fired and that if the employees voted in the Union or got involved in union activities, they would "have to pay the price."

While Paula Clark testified as a witness for the General Counsel, she did not corroborate the testimony of Monton or Burkel concerning these two alleged statements. Nor did Clark deny making these comments to Monton or Burkel.

Clark also testified to a conversation with Trucks at the Scottville office in February, shortly after the representation hearings, in the presence of Mary Jo Klomp. Clark asserts, substantially corroborated by Klomp that Trucks told them that those employees who testified at the representation hearings could not be trusted anymore and could "kiss their jobs goodbye." Trucks also added, according to Clark that employees Smith and Belongia could not be trusted any longer, and that she was not going to fight for funding for jobs for people that she could not trust.

Trucks categorically denied making either of the above statements to Clark or Klomp, and denies having any meeting or any conversations with Clark or Klomp by themselves, during which she discussed the Union or the hearing.

While Trucks also testified that she did not consider anything that any of the employees said at the representation hearing in her mind to be a basis for terminating their employment, when asked by Respondent's attorney whether she got upset or angry with any employees because of their testimony, her response was quite different and quite revealing. Trucks answered:

> No more than here. Just that people were—some people were clearly not—they were faking the truth and they knew that.

At that point her attorney asked if Trucks was of a mind to fire them "simply because they had subpoenaed by the Union to testify?" Trucks answered no.

Weatherization employees Monton, Smith and Belongia all testified that Clark specifically informed them that Trucks had told her (Clark) that employees who testified at the hearing on behalf of the Union would have their jobs eliminated. Clark admits that she made such statements to these three employees, who were all under her direct supervision.

Ann Walters, a community support worker who works for Respondent at its Baldwin office, testified concerning an incident and a conversation that she allegedly had with Trucks on March 1 outside the Scottville office, where Walters had gone for a meeting.

According to Walters, at 10 a.m. that morning, in the parking lot she encountered Trucks, who was with a person introduced to Walters by Trucks as a monitor from the Chicago Head Start office. After a brief discussion about work-related matters, Walters asserts that Trucks told her that it was too bad that she wasn't at the office earlier, because she had missed the fun. When Walters asked what fun, Trucks allegedly replied, "[T]he Union was here picketing and I'd like to kick their butts."

Once again, Trucks unequivocally denied making such a statement to Walters or anyone else. Trucks did recall seeing Walters at the office on that day when she was leaving the facility on that day along with the Federal monitor to visit centers. However, Trucks claims that she had no conversation at all with Walters on that day, and adds that she would never had made such a comment to Walters, even is she felt it, particularly in the presence of a Federal monitor.

In that regard, Trucks testified that when she arrived at the office with the monitor, they encountered the Union picketing the facility. According to Trucks she said good morning to Union Representative Holland, and offered him a cup of coffee and the use of the agency's restrooms. Trucks further asserts that the Federal monitor was somewhat concerned about that the union picketing might contaminate the monitoring process and suggested that had she known Respondent was having union problems she would have rescheduled the visit. The monitor also did not want her people talking with Holland.

Trucks argues that in view of the Federal monitor's expressed concerns about the union situation, she would never

had made remarks, it testified to, by Walters, it testified to by Walters in front of the monitor.

Respondent in connection with assessing the credibility of the various witnesses concerning the above allegations, relies upon a number of letters which were prepared by a consultant (David Parmenta) hired by Respondent, which were sent to its employees and/or supervisors. More specifically, Respondent points to the following question and answer in its letter of April 11 to employees.

> Question: Will employees who support the union be discriminated against in any way if the union is voted down?
>
> Answer: Absolutely NOT! We need to keep an open mind to the alternatives and issues that confront us. I have learned a great deal since this situation began. I value the fact the communication has become more open. No one will be discriminated against for their support of the union or for stating their opinions."

Respondent also calls upon portions of letters that it sent to all those employees whom it believed to be supervisors, dated January 23 and 26.

> You were cautioned to do nothing that would be perceived as interfering with this activity. Specifically to avoid actions which might give claim to an unfair labor practice charge . . . .
>
> The position of the Agency is that it is within the rights of those who are eligible to participate in a union. To vote and join if they so desire. They must decide what is in their best interest, without the benefit of your input . . . .
>
> Again, it is the agency position that eligible employees have a right to organize a union."

In this connection it is significant to note that these two letters were sent to a number of employees who were found by the Board not to be supervisors, such as teachers, weatherization crew leaders and inspectors, head cooks, and community service workers. It is also significant that Respondent failed to refer the other portions of the above letters to its alleged supervisors, which stated that supervisors should not be part of a union, and should not attend union meetings. Moreover, the letter also threatens that any "supervisor" who attends union meetings is violating instructions not to do so, and will be dismissed.

The remaining 8(a)(1) violations alleged against Respondent primarily involve the petition being circulated by some individuals calling for the removal of trucks and Pomeroy, and Respondent's reaction to that petition. Since the legality of Respondent's actions concerning this petition, is largely dependent upon whether or not activities is largely dependent upon whether or not activities of employees concerning such petition are considered to be protected concerted activity. I shall postpone evaluation of the alleged 8(a)(1) conduct with respect to the petition to my consideration of the various actions of Respondent alleged to have been motivated by employees petition related activity and which are alleged to be violative of Section 8(a)(3) of the Act.

2. Credibility resolutions and analysis

Based on comparative demeanor considerations, as well as the corroborative nature of their testimony, I credit the testimony of Belongia, Lange, Monton, and Burkel concerning their conversations with officials of Respondent, particularly Trucks, Rotzein, and Clark, as well as the mutually corroborative testimony of Clark and Klomp, concerning what Trucks said to them about employees who testified at the hearing, as related above. I note also that Trucks did not specifically deny the statements attributed to her by Belongia, and that Rotzein did not deny the comments that Lange testified Rotzein had made to her.

While I have considered, as requested the letters that Respondent sent at the behest of its consultant to its employees and/or alleged supervisors, but I do not believe that these letters are convincing proof that the comments attributed to Respondent's supervisors and officials were not made. On the contrary, although the letters did promise that employees would not be discriminated against for their support of the Union, the letters to supervisors also threatened that these alleged supervisors would be dismissed if they attended union meetings. It is clear that Respondent considered a number of employees involved herein, such as weatherization crew leaders and inspectors, teachers and head cooks who testified at the hearing to be supervisors, and not eligible for union representation. Indeed that was the very issue litigated at the representation hearing. It is also clear based on Trucks' admission during her testimony herein that she was upset and angry at the employees who testified at the hearing on behalf of the Union, that in effect they were not supervisors and therefore eligible for union representation, because these employees in her judgment had been "judging the truth."

It is therefore logical to conclude, which I do that Trucks was likely to have made the comments attributed to her by Clark, Klomp, Belongia, and Lange, all of which in some form or another indicate her displeasure with these and other employees whom she improperly considered to be supervisors, for choosing to be represented by the Union and/or for testifying at the hearing contrary to Respondent's position as to their eligibility.

However, with respect to the alleged conversation between Walters and Trucks as testified to Walters, I credit Trucks' testimony that such a conversation did not happen. I am persuaded as testified to by Trucks and argued by Respondent, that it is not likely that Trucks would make the comments attributed to her by Walters in front of a Federal monitor, who had already expressed sensitivity to the union situation. I also note that Trucks' testimony that when she encountered the pickets, she offered Holland coffee and use of the restrooms, was not rebutted by Holland and is therefore credited. Some comments do not indicate that Trucks was disturbed by the picketing, and lends further support to my conclusion that she would not likely have threatened to "kick their butts," in reference to the Union.

Having so concluded, I shall therefore recommend dismissal of paragraph 10(c) of the complaint, which alleges that Respondent advised its employees that it wanted to engage in physical violence to representatives of the Union.

However, I have concluded above that in early January, Trucks told Belongia that "if the Union was voted in, she would just fire everybody that she had done it once, and she could do it again." This remark is a blatant violation of Section 8(a)(1) of the Act and I so find. *Western Health Clinics*, 305 NLRB 400, 407 (1991).

During this same conversation, Trucks asked Belongia if he had heard about the Union, and who started the Union? This questioning of Belongia by Trucks, the highest management

official, *Matheson Fast Freight,* 297 NLRB 63, 68–69 (1989), in her office, the focus of managerial authority, *Pacesetter Corp*., 307 NLRB 514, 517–518 (1992), and accompanied by an unlawful threat of discharge. *International Door, Inc*., 303 NLRB 582, 600 (1991), constitutes coercive interrogation and a further violation of Section 8(a)(1) of the Act.

In this connection I note that the complaint makes no specific reference to Trucks having unlawfully interrogated employees in January. However, "it is well-sealed that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely related to the subject matter of the complaint and has been fully litigated." *William Pipeline Co.*, 315 NLRB 630 (1994); citing *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990).

Here, as in *Williams*, supra, the complaint does allege that Trucks made other coercive statements, including other alleged interrogations, and the union animus I disclosed by this unlawful interrogation is relevant to the various unlawful discharge allegations in the complaint, including one with respect to Belongia, the subject of the unlawful interrogation. Therefore there is a close connection between the violation sought and other subject matters of the complaint.

Moreover, there was no objection to Belongia's testimony in this area, and Respondent had an opportunity to cross-examine the witness and further explore the issue. Accordingly, I conclude that the issue was fairly and fully litigated.[16] *Williams*, supra.

I have also found above that Sanda Rotzein an admitted supervisor of Respondent, told Amanda Lange that employees should watch out who they tell that they are in support of a Union, because if it gets back to the office, "there might be trouble." I conclude that this statement by Rotzein, can reasonably be construed as an implied threat of reprisal against employees for their engaging in union activity. *Action Auto Stores,* 298 NLRB 875, 897 (1990). I so find.

Once again, although the complaint makes no reference to this allegation, based upon *Williams*, supra, it is appropriate to find such a violation. While the complaint does not allege that Respondent violated the Act by any conduct of Rotzein, the complaint does allege and Respondent admitted that Rotzein was a supervisor and agent of Respondent. Thus, Respondent was aware that the General Counsel was alleging it to be responsible for Rotzein's conduct. Since Lange is one of the alleged discriminatees herein, the statement which demonstrates Respondent's animus towards union activities in general and Lange's in particular, and which is similar to other allegations in the complaint, establishes a close connection between the violation found and the subject matter of the complaint.

Moreover, as in *Williams*, supra, the issue was fairly and fully litigated, since Respondent made no objection to Lange's testimony in this regard, and had an opportunity to cross-examine Lange fully and further explore the issue.

I have also found that Trucks informed Supervisors Clark and Klomp that employees who testified at the representation hearing could not be trusted anymore, and could "kiss their jobs good-bye." Trucks also made specific reference to Belongia and Smith as employees who could not be trusted any longer, and added that she was not going to fight for funding for jobs for people that she couldn't trust. While these statements of Trucks to Clark and Klomp are important demonstrations of Respondent's animus towards employees who testified at the hearing, and who supported the Union, and is highly relevant in assessing motivation for subsequent changes in conditions of employment of its employees, they do not in and of themselves constitute independent violations of the Act, since they were made to supervisors of Respondent by Trucks with no employees present.

However, when Clark subsequently repeated the essence of Trucks' remarks to Monton, Smith, and Belongia, Respondent thereby violated Section 8(a)(1) of the Act.

I have also concluded above that Clark told Monton that Trucks had informed her that "anybody who voted in the Union would be eliminated in a year." Also Clark told Burkel that Trucks always gets her way, and people get fired, and if employees voted in the Union or got involved in union activities, they would "have to pay the price."

Although Clark did not testify that Trucks made either of these comments to her, I have concluded that Clark did make the statements attributed to her by Monton and Burkel. Thus, since Respondent is responsible for Clark's statements to employees, I conclude that it is appropriate to find additional violations of the Act by Respondent based on these statements of threatening to discharge and unspecified reprisals in retaliation for employees' union activities. I also find

D. The Alleged Violations of Section 8(A)(3) and (4) of the Act

1. The alleged discrimination against Melissa Larson-Anderson

a. Facts

Melissa Larson-Anderson was employed by Respondent as a housing coordinator since April 1992, in its Scottville office.

Anderson attended a union meeting on January 17, which was also attended by Supervisor Rotzein.

On February 2, Larson-Anderson submitted to Respondent a letter of resignation, indicating that her last day of work would be February 17, which was a Friday. Subsequently, Larson-Anderson was subpoenaed by the Union to testify at the representation hearing which commenced on February 10. In connection therewith Larson-Anderson was present at the hearing on February 10, 13, and 14, but was not called as a witness. However on February 10 and 13 during the course of the hearing and during breaks, Larson-Anderson, in the presence of Trucks would go over to Union Representative Holland and/or Union Attorney Darrell Cochran, and ask a question or make a comment.

At the end of the second day of hearing, on February 13, Larson-Anderson testified that Trucks summoned her over to where Trucks was sitting next to her counsel and Pomeroy. According to Larson-Anderson, Trucks told her that she (Trucks) no longer wanted Larson-Anderson in the building that she did not want her in clients' files or on the premises at all. Larson-Anderson replied that Trucks was terminating her because she was not allowing her to make all of her time. Trucks responded that she was not terminating Larson-Anderson, but accepting her resignation.

Trucks does not deny the substance of her conversation as testified to by Larson-Anderson, but asserts that she did not summon Larson-Anderson. Instead, according to Trucks, Larson-Anderson approached her at the hearing and asked Trucks

[16] In fact, Respondent's attorney did cross-examine Belongia concerning his testimony about this conversation with Trucks.

when she should report to work. Trucks admits that she replied that Larson-Anderson need not return to work, and then claims that she told her attorney, but still in Larson-Anderson's presence that she did not want Larson-Anderson to be in the office going through records.

Clark testified that she had been scheduled to take over the responsibilities of Larson-Anderson when the scheduled resignation was to have been effective on February. According to Clark she had an appointment scheduled to meet with Larson-Anderson on February 16 to go through Larson-Anderson's files and to have Larson-Anderson explain to Clark the status of all of the projects that were being worked on.

Clark further testified that she had a conversation with Trucks either on February 15 or 16 during which she asked what had happened to Larson-Anderson. Trucks allegedly replied that Larson-Anderson was not back, because during the hearing, Larson-Anderson kept jumping up and talking to the union representative and the union attorney. Therefore, Trucks told Clark that she could no longer trust Larson-Anderson and would not let her come into the office. Clark also asserts that Trucks stated that she had fired Larson-Anderson.

Trucks for her part, made no specific denial of Clark's testimony, but did deny that her decision not to allow Larson-Anderson was in any way motivated by the fact that she had been subpoenaed to testify by the Union or had appeared at the representation hearing. According to Trucks, she didn't want Larson-Anderson back because there was nothing left for her to do, and because Larson-Anderson had been angry after an argument with Clark, which had immediately preceded Larson-Anderson's resignation.

Trucks did respond in part to Clark's testimony by asserting that Larson-Anderson had completed everything that she had to do and in fact Clark had already met with Larson-Anderson and obtained all the necessary information that Clark needed to complete the transaction. Thus, Trucks claims that although she had not made the decision not to permit Larson-Anderson to return to work until the hearing, when she was asked about it, that she (Trucks) felt that since Larson-Anderson had nothing to do, and she had previously argued with Clark, that it was better not to bring more tension into the office.

Respondent submitted a number of documents, which Trucks asserts supports her testimony in this regard. The documents include memos, which show that Trucks had previously criticized Larson-Anderson concerning her productivity, and Larson-Anderson's response, plus documents indicating meetings that were held between Larson-Anderson and Clark concerning HPG projects even before Larson-Anderson submitted her resignation. A memo dated January 31 from Clark to Trucks, states that Clark worked with Larson-Anderson on bringing HPG up to speed, and that they prepared status goals and plans to reach goals. The memo also states, "This will be submitted by Melissa."

Another memo dated February 1 from Clark and Larson-Anderson to Trucks, refers to their meeting of January 30, and indicate that they (Clark and Larson-Anderson) will work together to coordinate and complete HPG and weatherization projects.

A memo dated February 1 from Clark and Trucks reflects that Clark had prepared a plan of action as discussed in prior memos, but that Larson-Anderson appeared to have gotten offended when Clark urged her to assist in setting goals, and that Larson-Anderson was defensive, upset and angry. The memo also indicates that Larson-Anderson apologized and "we proceeded to prepare plans."

The next day, as noted above, Larson-Anderson submitted her resignation, dated February 2, effective February 17.

Clark also submitted another memo to Trucks dated February 14. In this memo, Clark reports that she spent the afternoon in Larson-Anderson's office, where she read grants, assessed job status, reviewed computations, read letters and forms, reviewed files, and began a list of questions. The questions, as reflected in Clark's memo were:

> 1) Which guidelines (income) are used for HPG?
> 2) What is the max spent on an HPG job? Is there a ceiling?
> 3) Need to find: forms required, contractor list, work files that are pending information.

The memo concludes with the following statement by Clark.

> Melissa's office is total chaos. This could take a few days!!

In fact in the memo the word years is written in parenthesis with a question mark next to it, after the word days, but then was crossed out, apparently by Clark herself.

It is undisputed that Larson-Anderson did receive her full pay for the 3 days that she was not allowed to work.

b. Credibility resolutions and analysis

The record reveals a minor dispute between Larson-Anderson and Trucks, as to whether Trucks summoned Larson-Anderson over to her, or whether Trucks merely responded to Larson-Anderson's inquiry as to when to return to work. However these variations are inconsequential, and I need not decide which version is correct, inasmuch as the substance of Trucks statements to Larson-Anderson are not in dispute. Thus, Trucks informed Larson-Anderson not to return to work, and that Trucks did not want her going through Respondent's files.

However, it is important to assess the credibility of Clark's testimony concerning her alleged conversations with Trucks concerning Larson-Anderson. I found Clark to be a candid and believable witness, and I credit her testimony here, as well as her testimony discussed infra, concerning her other conversations with Trucks. I note that Trucks did not specifically deny this conversation with Clark, although it could be argued that she inferentially did so, by denying that the hearing had any bearing on her actions with regard to Larson-Anderson, and by Trucks' assertion that Larson-Anderson had nothing to do.

I have considered the documents presented by Respondent allegedly to establish this latter fact. Not only do I believe that they do not do so, but on the contrary tend to corroborate the testimony of Clark which I have credited above, that she did have an appointment with Larson-Anderson to go over the latter's files and have Larson-Anderson explain the status of various projects. I note particularly in this regard Clark's daily summary of her activities on February 14 where she described how she had spent the afternoon in the office of Larson-Anderson attempting to review files that she had several questions that needed answering, and that Larson-Anderson's office was in such a mess that it could take a few days for Clark to find out the information that she needed. These comments by Clark strongly suggest that Larson-Anderson's assistance would have been most helpful if not essential in assisting Clark in taking over Larson-Anderson's responsibilities.

Accordingly, I credit Clark that she had an appointment with Larson-Anderson to go over files and projects, and that appointment could not be kept, because Trucks would not allow Larson-Anderson to return to work after February 14. I further credit Clark that when she asked Trucks what had happened to Larson-Anderson, Trucks informed Clark that Larson-Anderson kept jumping up and talking to the union representative and the union attorney, and therefore Trucks could no longer trust Larson-Anderson to be allowed to come into the office.

The actions of Respondent with respect to Larson-Anderson must be analyzed under the standards of W*right Line*, 25 NLRB 1083 (1980), and *Transportation Management Corp*., 462 U.S. 393 (1983). Whether Respondent's action is considered a termination or merely an acceleration of Respondent's acceptance of her resignation, *Wright Line* standards must be applied, since it involves a change in Larson-Anderson's terms and conditions of employment.

It is clear that the General Counsel has established a strong prima facie case that Larson-Anderson's participation at the representation hearing in support of the Union was a motivating factor in Respondent's decision to terminate her employment on February 14. Thus, it is undisputed that Trucks informed Larson-Anderson on that date in the hearing room, that Larson-Anderson should not return to work and that Trucks did not want her to be going through files. While the timing of this action above would be sufficient to establish a prima facie case, such a finding is substantially strengthened by Clark's credited testimony that Trucks told Clark, when she inquired about Larson-Anderson, that Trucks could no longer trust Larson-Anderson because she had assisted union officials during the course of the representation hearing.

The burden then shifts under *Wright Line* to Respondent, to establish by a preponderance of the evidence, that it would have taken the same action against Larson-Anderson absent her protected conduct. Respondent has fallen far short of meeting its burden in this regard.

Trucks testified with respect to her decision that it had nothing to do with Larson-Anderson's activities at the hearing but was solely motivated by the fact that there was nothing left for Larson-Anderson to do, plus the fact that tension had existed between Clark and Larson-Anderson which Trucks did not wish to continue. While Respondent argues that Trucks' testimony in this case is corroborated by the documents that it submitted I do not agree. As noted above, I have concluded above that Clark's February 14 memo (the day of the termination) indicates that she (Clark) had much difficulty in attempting to review Larson-Anderson's files, and that clearly Larson-Anderson's assistance would have been most useful to Clark enabling her to fully take over Larson-Anderson's prior responsibilities.

The other documents submitted by Respondent did reveal that Trucks had previously Larson-Anderson's productivity, that Clark and Larson-Anderson had previously met and worked together on certain HPG projects, and that Clark had characterized Larson-Anderson as defensive, upset, and angry. However, all of these documents were dated prior to the date that Larson-Anderson submitted her resignation. Indeed it appears that the resignation decision by Larson-Anderson may have been in part related to her argument with Clark on February 2.

However, despite full knowledge of all the facts that Trucks allegedly relied upon on February 14 to terminate Larson-Anderson, on February 2, Respondent accepted the resignation with a last working day of February 17 without question. Respondent allowed Larson-Anderson to continue to work, although she allegedly had nothing to do, and tension existed between her and Clark, through February 9. It was only after Trucks observed Larson-Anderson's presence and actions at the hearing in support of the Union, that she suddenly decided that Respondent would no longer permit Larson-Anderson to appear at its premises and work on its files.[17]

Respondent also argues, in mitigation of its actions that it paid Larson-Anderson for the 3 days that she did not work. While this action may relieve Respondent of any backpay liability to Larson-Anderson, it does not either mitigate nor cure Respondent's conduct. To the contrary, in my view it shows the extent of the animus towards the union activities of its employees by Respondent in general and Trucks in particular. Thus, Trucks was so upset at Larson-Anderson for her actions at the hearing, which Trucks construed as disloyalty to Respondent, that she felt that she could no longer trust Larson-Anderson to work on Respondent's files, and was willing to pay Larson-Anderson for 3 days for not working, when it was clear that there was important work for Larson-Anderson to do. Trucks preferred to have Clark waste her time trying to find things in Larson-Anderson's messy office and get up to speed on Larson-Anderson's files and projects without Larson-Anderson's assistance. I find this conduct of Respondent demonstrates the depth of Trucks' dislike of the Union in general, and more particularly her equating union support with disloyalty and distrust, especially concerning employees she believed to be supervisory or managerial employees.

Accordingly, I conclude that since Respondent has not met its burden of proof, its actions in regard to Larson-Anderson is violative of Section 8(a)(1), (3),[18] and (4) of the Act. *Care Manor of Farmington,* 314 NLRB 248, 254–255 (1994).

2. The warning issued to Dave Smith

a. Facts

Dale Smith was employed by Respondent as an inspector in the weatherization department, on September 20, 1994. Respondent took the position at the representation hearing that Smith's position was supervisory or managerial and should be excluded from the unit. Smith testified at the hearing on behalf of the Union, contrary to Respondent's position on these issues.

As noted above, after the hearing, Trucks informed Clark (who was Smith's immediate supervisor), she could no longer treat Smith (and Belongia) because of their testimony at the hearing, and threatened to discharge and/or not fight for funding for such people. Clark repeated Trucks' comments to both Belongia and Smith.

Dale Smith was also one of the observers for the Union at the election held on April 28. In that connection, on April 24, Smith asked Clark for permission to take off on April 28 so he could serve as the observer. Clark informed Trucks of Smith's request on the same day, which request was granted.

[17] In that connection Trucks admitted that she did not decide to terminate Larson-Anderson until February 14, during the hearing when Larson-Anderson allegedly asked her about when to return to work.

[18] While Respondent argues that it had no specific knowledge of any union activities of Larson-Anderson, her conduct at the hearing of assisting the union representatives is clearly activity in support of the Union, as well as activity in connection with NLRB proceedings.

Later on that same day, April 24, Smith stopped in at Respondent's intake office located in White Cloud. According to Smith he did so pursuant to standard company practice to stop at intake offices, if they are in the area to see if any paper work needed to be delivered to the Scottville office. Smith further asserts that while he was at the intake office and after making some phone calls, he noticed that the election notices were not posted. Therefore, he asked Lori Murphy, the community support worker who was in charge of that office, why the notices were not posted, since they had been posted at Scottville. Murphy replied that she wasn't aware that anything had to be posted.

Smith also testified that on that day he at first left the Scottville office and swing past Chase to meet with an agency client named Ringler and a contractor. Neither Ringler nor the contractor were there, so Smith asserts that he then headed for White Cloud, which is some 30–45 minutes away, in order to meet with an HPG inspection job, South of White Cloud. Smith claims that this appointment had previously been set up, by whom he could not recall, but that the client was not home. Thus, he then proceeded to the White Cloud intake office, which was nearby. Smith could not recall the name of the HPG job South of White Cloud that he was allegedly scheduled to inspect, and could not recall the route that he took to go from the Ringler's to this job.

After Smith left, Murphy called the Scottville office and informed Respondent that Smith had asked about the election notices, and inquired[19] as to whether they should be posted. Pomeroy informed Murphy that he would send the notices out to her for posting.

Later on that day, Clark received a memo from Trucks, indicating that it was reported to her that Smith made an unauthorized stop in White Cloud under the pretense of checking to see if he had anything to go to Scottville. The memo goes on to say, "While there, he proceeded to attend to Union business. Please give Mr. Smith clear directions that he is not to use agency time for such activities. Instruct him in the proper request for Time Off Procedures."

According to Clark, Trucks never asked her to get Smith's side of the story, before ordering that he be issued a warning. Clark further testified that she wrote up several proposed memos to Smith, submitted them to Trucks, who made some changes and at one point told Clark that her proposed memo was "too wimpy."

Finally, a memo was approved by Trucks, typed up, and handed to Smith by Clark. The memo reads as follows:

TO: DALE SMITH, POST INSPECTOR

FROM: PAULE M. CLARK, WEATHERIZATION DIRECTOR

DATE: APRIL 25, 1995

RE: UNAUTHORIZED STOPS
USE OF AGENCY TIME

On Monday, April 24, 1995, you stopped in at the White Cloud office under the pretense of checking to see if they had anything to go to Scottville.

Your responsibilities as Post Inspector do not include unauthorized stops at county offices. You are to go to daily assigned work sites ***only***. Use of agency time and resources, ie; [sic] vehicle, mileage, telephone, etc. for any non-agency activities can result in your termination.

Should you require time off for personal or union business, you are to use the proper FiveCAP, Inc. procedure of requesting a particular date in advance on a Request for Personal Business Time form.

Also, effective immediately, you are to turn in a daily accounting of your time to the program Director at the end of each day.

Clark further claims that when she gave the memo to Smith, he informed her that he had a good reason for being in the White Cloud area, something about meeting a contractor in the area, but she could not recall the specific reason given by Smith. Clark admitted, however, that she could not recall whether or not Smith had called previously or informed her that he was going to be in the White Cloud area. Clark also admitted that weatherization employees should not divert from their route more than a maximum of 10 miles, unless they have permission to do so, but she did corroborate the testimony of Smith that employees do generally stop in at intake offices, if they are in the area to see if anything needs to be delivered back to Scottville.

Mary Trucks testified that someone from her office, whom she didn't recall, reported to her that Lon Murphy had called and said that Smith had been "harassing" her at the White Cloud office, and that it was also reported to her (Trucks) that Smith had been inquiring about the election notices. According to Trucks, she then asked Clark to find out why Smith was at White Cloud, and that Clark reported back to Trucks that Smith had claimed that he was there to see if anything needed to be picked up to be brought back to Scottville.

Trucks asserts that she then ordered that the memo be issued to Smith, solely because of his having made an unauthorized stop. Trucks further testified that Respondent's policy is that employees must sign in and out and go to their stated destination unless they have permission from supervisors to go elsewhere. Trucks also testified that a review of Respondent's files indicates that it did not have any HPG client south of White Cloud on April 24, or any other date for that matter. Moreover, according to Trucks, corroborated by a memo written by Clark on April 24, Clark told Trucks that Smith had in fact (contrary to Smith's testimony) inspected the Ringler's house on that day, and reported that it had passed inspection.

Lori Murphy testified that when Smith arrived at White Cloud, the first thing that he said was an inquiry about the election notices. Murphy also testified that Smith did not mention anything about stopping at the officer to pick up anything to go back to Scottville, and confirmed Trucks' testimony that ordinarily employees do not stop at the office to bring something to the main office, unless a specific request is made that they do so. Murphy also denied that she told anyone from Respondent that Smith was "harassing" her when he asked about the election notices.

Evidence was adduced from Respondent as to other warnings that were issued to other employees, for similar conduct. Thus, on March 29, 1993, Weatherization Director Albert Kajtazi issued a written warning to crew laborer, David Monton criticizing Monton for stopping at the White Cloud office en route for a jobsite, which took 20–30 minutes out of his workday. The memo goes on to say that Monton should stop at

[19] Murphy initially spoke to the secretary, Terese Lombard, and then was called back by Pomeroy.

Respondent's offices only when directed by a supervisor, and if this problem is not corrected, his continued employment with Respondent will be in jeopardy.

Further on April 22, 1994, Diane Simolinski, a supervisor of Respondent, issued a memo to all busdrivers, indicating that buses are not to be used to conduct personal business, and that buses are only to be used for business-related reasons. It added that drivers are not even allowed to use the bus to stop for coffee in between routes. In such case, the driver must first take their bus home and use their own vehicle to do so.

Finally on April 24, 1995, Clark issued a written warning to Belongia,[20] criticizes Belongia for stopping at Manistee Ford along with Monton to pick up a van enroute to the Scottville office.

The memo reads as follows:

> On Monday, April 17, 1995 you and David Monton stopped at Manistee Ford to pick up a van while enroute to the Scottville office.
>
> As a supervisor, you were fully aware that there was no prior approval given for this action and it was completely unacceptable for you to presume that you had the authority to divert from your job duties without specific direction, let alone encourage and/or allow a subordinate to act in this inappropriate manner.
>
> In the future, you are to acquire approval before making any changes or adjustments in your daily schedule. Failure to do so will result in serious disciplinary action and/or dismissal.

b. Credibility resolutions and analysis

In this instance I have credited the testimony of Trucks and Murphy, over the testimony of Clark and Smith with respect to several areas, where their testimony conflicts.

More specifically, I find that consistent with the testimony of Trucks and Murphy, and contrary to Smith and Clark, that Respondent's policy does not permit employees to stop by at other offices of Respondent to see if anything needed to be brought back to Scottville, but that such conduct is allowed only when such a request is made and authorized by a supervisor. Generally, I found Murphy to be one of the few witnesses who testified during the trial, with no apparent stake in the proceeding, and she impressed me as someone who although uncomfortable in being called as a witness, was simply trying to tell the truth as best that she can recall.

I also rely upon the prior memos issued by Respondent to employees, prior to any union organization, which demonstrated that Respondent did not permit stops at other facilities without direction by supervisors.

I also find, consistent with Murphy's testimony that Smith did not ask Murphy if she had anything to bring back to Scottville, and that his only comments to her were his inquiry about the election notices. Consequently, I also credit Trucks that she did in fact ask Clark to find out what Smith was doing in White Cloud, and that once Clark made that inquiry of Smith, he then told Clark that he was there to see if anything needed to go to Scottville, which in turn was reported back to Trucks by Clark.

I also find again consistent with the testimony of Trucks, that Smith did not have a scheduled appointment for an HPG job near White Cloud, on April 24, as he testified. I note in its connection that Smith's credibility with respect to this incident is further diminished by Clark's memo of April 24, which indicates that Smith had in fact, contrary to his testimony, inspected the Ringler's job on April 29.

Having made these credibility findings, I am still persuaded that the General Counsel made a sufficient showing, under *Wright Line*, supra, that Smith's protected conduct was a motivating factor in Respondent's decision to issue its written warning to him on April 24. Thus, Smith was a known advocate of the Union, had testified at the hearing on behalf of the Union, and Trucks had specifically mentioned Smith's name to Clark as one of the employees whom she could not trust and would terminate because of their testimony at the hearing. Additionally, the memo from Trucks to Clark, ordering Clark to issue the warning made specific reference to the fact that Smith had attended to union business at the facility while on agency time. Moreover, the warning was issued on the very same day that Respondent was notified that Smith was going to be the observer for the Union at the election scheduled for April 28. These factors are more than sufficient to demonstrate the requisite connection between Smith's protected activities, and Respondent's decision to issue the warning to him.

However, I am also persuaded that Respondent has met its burden of establishing that it would have taken the same action against Smith, even absent his protected conduct. Thus, since the evidence reveals that Respondent's issuance of a written warning to Smith was consistent with its treatment of other employees who had committed similar offenses, I conclude that Respondent has met its burden of showing that it would have taken the same action against Smith, whether or not he was engaging in union activities during his unauthorized stop at White Cloud. *Elmo Greer & Sons*, 312 NLRB 703, 704 (1993) ([l]ayoffs in accord with past practice rebuts the General Counsel's prima facie case); *Tricil Environmental Management,* 308 NLRB 669, 678 (1992) ([c]ompany uniformly treated employee absences same way as it treated alleged discriminatee); *Merillat Industries,* 307 NLRB 1301, 1302–1303 (1992) (*Wright Line* burden met since discharge of employee consistent with treatment of other employees who had committed similar offenses); and *Sunlend Construction Co*, 307 NLRB 1036, 1043 (1992) ([e]mployer showed through its termination records that it routinely discharged employees for infractions similar to its allegations regarding alleged dicriminatee).

Here, Respondent submitted evidence of three prior similar incidents, where it issued written warnings to employees who engaged in similar conduct to that of Smith, two of which occurred prior to the commencement of any union organizing activity. I place particular emphasis on the March 29, 1993 warning issued to Monton for virtually identical conduct to that of Smith, at the very same location, Respondent's White Cloud location. In fact, the conduct of Smith appears to be more egregious than that of Monton in 1993, since Smith I have found he went 30–40 miles out-of-his-way, for no legitimate reason, in order to stop at White Cloud to check and see if the election notices were posted. Monton on the other hand stopped off at White Cloud while he was admittedly on route to a jobsite, and therefore, did not have to go out of his way, as did Smith. Yet, Monton nonetheless received a warning, because the stop took 20–30 minutes from his workday, and because he did not receive permission from a supervisor to stop at White Cloud. Thus, I am persuaded that Respondent has consistently disciplined employees who make unauthorized stops, thereby using company time for personal business, whether it be union

[20] This warning was not alleged in the complaint to be unlawful.

be union activities or any other nonagency related activity. Therefore, I conclude that Respondent has shown that it would have issued a warning to Smith whether or not his unauthorized stop included union activities, and whether or not Smith was a known union activist prior to the incident.

Accordingly, I shall recommend dismissal of this allegation of the complaint.

3. The removal of the office of Smith and Belongia to the basement and removal of his desk

a. Facts

Prior to April 25, Smith shared an office with Tom Belongia, Respondent's inspector/field supervisor on the main floor of Respondent's Scottville office. As noted above, Respondent took the position at the representation hearing, that both Belongia and Smith were supervisory and managerial employees. Both Belongia and Smith testified at the hearing on behalf of the Union, in opposition to the positions taken by Respondent as to these issues.

As also found above, Trucks informed Clark (this supervisor of both Belongia and Smith) after the hearing, that she could no longer trust those employees who testified on behalf of the Union, that these employees could "kiss their jobs" good-bye, that she would not request funding for jobs for people whom she could not trust, and specifically mentioned Belongia and Smith as employees that she did not trust. Also, Belongia was told personally by Trucks that if the Union was voted in, she would fire everyone.

On April 25, as noted, the day after Respondent was notified that Smith was to be the Union observer at the election, Clark informed Smith, that pursuant to the orders of Trucks that the office shared by him and Belongia was to be moved downstairs to the basement. Smith was told that the employees could not take their desks down to the basement. Clark also informed the employees that Trucks had told her that the reason for the move was that their office was "messy". Neither Smith nor Belongia had ever been warned or even spoken to previously about their office being messy by any supervisor. The basement had previously been used as an office and storage area for the weatherization crew (not the inspectors or field supervisors), and was "dark" and filled with equipment, paint cans and other odds and ends used by the crew.

After Smith complained to Clark about not having a desk in the basement, she permitted him to take a small desk (not the one he was previously using) to the basement. Even that desk was subsequently removed without Smith's knowledge. Belongia did not have a desk at all in the basement, so he was forced to rig up a bench so he could do his paperwork.

Clark testified that on April 24, Trucks informed her that Smith and Belongia's office was dirty and messy, she would not tolerate it and instructed Clark to move them to the basement immediately. Trucks wrote a memo to Clark, dated April 24, dealing with a number of subjects, including the following:

> *RELOCATE WEATHERIZATION SECOND OFFICE:*
>
> Set up office for Weatherization on lower level. Filing cabinet, work table, and chairs will be adequate. These people are expected to be out in the field working and in the recent past this worked very well. Based on past experience, it will be necessary for you to stress and insist that the office be kept clean and free of pop bottles and cans.
>
> The office next to you is to be cleared of weatherization equipment and tools and left in a usable condition.

According to Clark, as well as Smith the office had not been dirty, but was a working office, with papers strewn around, and it may have contained a pop can or some tools as well. Clark asserts that she had never been instructed by Trucks to issue a warning to Belongia or Smith concerning the conditions of their office. In fact according to Clark the only time that Trucks ever said anything to her about the condition of the office was on Friday, April 21, the workday prior to Monday, April 24. On that occasion, as Trucks was going out the back entrance where the office is located, she told Clark that she wanted the office to be cleaned up. In fact Clark cleaned the office herself, and said nothing to the employees about Trucks' complaint.

Trucks testified that the office that Smith and Belongia were occupying was never officially assigned to them, but that when Belongia ceased being weatherization director, it was necessary during the transition period to interact with his successor, Paula Clark. No issue was made by Trucks of the fact that Belongia apparently setup his office permanently, on that level along with Smith. However, Trucks asserts that on more than one occasion when passing by the office, she would observe broken equipment, tools, caulking materials, and pop bottles in the office, and that she would say to Clark "in passing and almost jokingly on more than one occasion, have these guys take care of this." Trucks did not testify as to how frequently or when she would make these comments to Clark, but adds that the office was not cleaned up. Therefore, according to Trucks, in her view it was important for the image of the Agency that offices be neat, and that Board members and visitors frequently pass by the office, and the office speaks about the attitude of employees about the job. While Trucks testified that she did not instruct Clark to take desks away from Smith and Belongia, she admits that she told Clark in person and in the memo, to give the employees a filing cabinet, a worktable and chairs. Trucks also testified that in her view they did not need the large desk that they had in their prior office, in order to perform their job adequately. Trucks also denied that her decision to order the move of the office had anything to do with any union activities of either Smith or Belongia.

Clark testified that the office in question was located near the back entrance, and that clients, visitors or board members would not generally pass b y the office, and would very rarely be in a position to look into this office. Clark also testified, confirmed by a memo written by trucks dated March 7, 1995, that employees and visitors are not permitted to use the back entrance, and they must use the front entrance (which is not near this office) to enter and leave the Scottville office.

b. Analysis

I once again conclude that General Counsel has made a sufficient prima facie showing that the union activities of Smith and Belongia, were a motivating factor in Respondent's decision to move their office to the basement,[21] and take away their desk. I note that Belongia and Smith were clearly known and believed by Respondent to be Union adherents, inasmuch as they both testified at the hearing on behalf of the Union and contrary to Respondent's position as to their eligibility for in-

[21] While Trucks characterized the move as to the first level, rather than the basement, I find this distinction insignificant and irrelevant to the issues.

clusion in the bargaining. Moreover, on April 24, the day before their office was moved, Smith notified Respondent that he was to be an observer for the Union at the election scheduled for April 25.

Animus towards their union activities established by Trucks' comments to Clark, which were in turn repeated to the employees, to the effect that she no longer trusted Belongia and Smith because they had testified at the hearing ant that those who testified would no longer have jobs with Respondent. A similar threat to discharge those who voted for the Union, was also made directly by Trucks to Belongia.

Accordingly, the above facts establish a strong case of discriminatory motivation. Once again the burden shifts to Respondent to establish by a preponderance of the evidence that it would have taken the same action against the employees, absent their protected conduct. Here, I conclude that Respondent has fallen far short of meeting its burden in that regard.

Its evidence with respect to this issue consisted solely of the uncorroborated and contrived testimony of Trucks. The first portion of her testimony that one of the reasons for her decision was that the office had never been officially assigned to Belongia or Smith, is clearly pretextual since they had apparently been occupying the office for several months without being told to move.

The principal reason given by Trucks, that the office was so messy that she decided to move it downstairs, out of the view of visitors or clients, is not convincing.

I note that Trucks did not specify in her testimony how often or when she allegedly noticed the "messy" office, and told Clark to have the employees clean it up. She also did not testify as to when she actually decided to order the move, or what particular mess she observed on that occasion. I find it significant that even Trucks admits that she never spoke to the employees herself about the problem or ordered Clark to warn them that she was contemplating moving their office unless they straightened it up. Indeed, Trucks admitted that her comments to Clark about the office were made "in passing and almost jokingly," thus, making it less likely that Trucks considered it such a serious problem that she would order the office to be moved without so much as one warning to the employees.

Moreover her alleged concern that the office was frequently seen by visitors and clients is discredited by her own memo, which forbids anyone from using the back door which leads to the office, as well as Clark's credited testimony that it is rare for anyone from the outside to see that office.

Thus, for the above reasons, I conclude that has not shown it would have moved the office and taken away the desk of Smith and Belongia, absent their protected conduct. Therefore, by such action Respondent has violated Section 8(a)(1), (3), and (4) of the Act.

4. The layoff of Smith

a. Facts

The weatherization department of Respondent was, as noted supervised by Paula Clark, the director. Belongia was the field supervisor-inspector, and Smith was an inspector. Inspectors work consisted of inspecting jobs both before work is commenced (preinspection) and after the work is completed (past inspection). David Monton and Art Burkel were members of a two-person crew, who performed the labor on the particular weatherization jobs.

On April 28, as noted the union election was held, resulting in an overwhelming victory for the Union, during which Smith served as one of the observers for the Union.

That same evening, Smith received a call from Pomeroy, who informed Smith that because Clark had just resigned and Belongia was on sick leave, both he (Smith) and Monton would be laid off for a brief period of time. Smith told Pomeroy about one particular job that he was involved with that needed to be past inspected, so a contractor who did work on the project could be paid. Smith added that the contractor was very concerned about getting payment so he could pay his employees. Pomeroy told Smith that he would speak to Trucks and see if Smith could come in to inspect that job. Subsequently, Pomeroy called Smith and informed him that he could come in and finish that work, which Smith did on May 4.

Smith received a letter from Respondent, dated April 28, which states that due to the resignation of the director and the fact that the field supervisor and a laborer are on sick leave, Respondent has determined that it is not possible to operate the program with 67 percent of positions sick or vacant. Thus, the remaining employees are laid off effective April 28. The letter adds that the layoff is expected to be 2 weeks or less, until transition is complete and a new director is in place.

Clark testified that when she resigned on April 28, she left on clipboards in her desk, scheduled work for approximately 3 weeks of work for the inspector and the crew. According to Smith, there was a lot of work that he could have performed when he was laid off, including preinspection work performed by Belongia. Smith also testified that he was familiar with the status of jobs, and was capable of informing Respondent which jobs were in progress and which ones were scheduled to have bids sent out on them.

Trucks testified that she made the decision to layoff Smith (and Monton), because on April 28 that Clark had resigned, effective immediately without giving Respondent any notice, Belongia and Burke[22] were on sick leave, and she felt that Respondent should lay off the remaining employees. She asserts that Respondent needed time to "regroup," and determine from looking at the weatherization files what work need to or could be done. Trucks conceded that if there was work that was preinspected and ready to go, Smith and Monton could have done the work, but states there was no feasible way for Respondent to determine on April 28 what work was ready to be performed by these employees.

Pomeroy testified that late in the day on April 28, Respondent was informed that Clark had left, and told others that she was not returning. At that point, Pomeroy claims that he and Trucks discussed the state of the weatherization program, and decided that since there was no one to supervise Smith and Monton, that Respondent would temporarily lay them off. Thus, they wrote the letters on that day and sent a letter to Monton similar to the one sent to Smith. Pomeroy suggested that he try and call Smith and Monton to let them know that they should not come in to work on Monday. May 1.

Pomeroy admits that when the decision was made, Respondent made no effort to contact Clark to see if she was really quitting, or to inquire what assignments, if any, she had left for

[22] In that connection, Respondent submitted a certification from Belongia's doctor dated May 11, indicating that Belongia was incapacitated and under the care of that doctor from April 28 to May 8 and can return to work on May 11.

employees. Pomeroy claims that it was not possible for Respondent to find out at that late hour about work availability, since it would require time to go through the weatherization files. Significantly, Pomeroy conceded that Smith was familiar with the program and the files, and asserts that if there was additional work to be done, Smith should have told him so when Smith did inform Pomeroy of the one job that Respondent eventually permitted him to perform.

Pomeroy also admitted that when Respondent made its decision, it did attempt to find out whether or not Smith or Monton had already been given assignments for work to be performed on Monday, May 1. Indeed, according to Pomeroy, when he called and notified Monton about the lay off, Monton told Pomeroy that he was working on several jobs that he could finish up on his own, and that Respondent permitted Monton to do this work. Pomeroy was not sure whether he told Monton at that time to come in and work on Monday, or whether he informed Monton on Monday, so that Monton may have missed 1 day of work and come in on Tuesday.

Respondent also submitted these memos from Clark to Trucks, dated March 16 and 20, relative to this issue. In the March 16 memo, Clark informed Trucks that there was nothing specific for Monton to do on March 16, so she sent him home at noon. The March 20 memo was a recommendation by Clark that Monton be laid off from March 21 to April 3, and asserting that Smith and Belongia will handle the maintenance work in the interim. Trucks replied in writing that the recommendation was unreasonable because there were many unfinished jobs, and that "down time and lay offs are not good decisions." Trucks also testified that Respondent was as of April 28 still far behind in many jobs, which was why she allowed Smith to come in and finish the job that he informed Pomeroy he could perform. Trucks testified further, "[W]e were so far behind that if there was anything to be done, we would get it done."

b. Analysis

I find that the General Counsel has presented compelling evidence that protected conduct of Smith was a motivating factor in Respondent's decision to lay him off on April 28. As detailed above, the animus directed towards employees who testified at the hearing on behalf of the Union in general, and Smith in particular, is clearly established by Trucks' comments to Clark, which were in turn repeated to Smith. Moreover, Respondent has concluded above, unlawfully moved Smith's office and removed his desk in retaliation for his union activities and testimony at the hearing. Most importantly of all, Smith acted as an observer for the Union in the election which the Union was overwhelmingly, on the very same day that Respondent decided to lay him off.

In light of the General Counsel's strong showing, the Respondent's burden under *Wright Line* of establishing that it would have taken the same action absent Smith's protected conduct, is substantial. *American Wire Products*, 313 NLRB 989, 995 (1994); *Vemco, Inc*., 304 NLRB 911, 912 (1991).

I conclude that Respondent has not adduced sufficient evidence to meet its burden in this regard. The testimony of Trucks and Pomeroy to the effect that the sole reason for Respondent's actions were the sudden resignation of Clark, the unavailability of Belongia, and the inability of Respondent to determine what work was available for Smith (and or Monton) is not persuasive.

While it is true that Clark did quit on April 28, and Belongia was also on sick leave at that time, I cannot conclude that these facts were the motivating factors in Respondent's actions. I note primarily the hasty precipitous manner in which the layoff was implemented. See *Vemco*, *Inc*., supra at 912. While Respondent's witnesses claim that there was no feasible way for them to determine the availability of work for Smith or Monton, admittedly it made no effort to do so. It made no attempt to contact Clark to see if she was really quitting or to inquire about the status of her work assignments. Indeed the evidence discloses, based on Clark's credible and unrebutted testimony, that she had left assignments on her clipboard in her office for 3 weeks of work. Thus, had Respondent simply looked in Clark's office, it would have seen that work could have been performed by Smith or Monton, notwithstanding the absence of Clark or Belongia. Indeed, when Pomeroy contacted Monton to notify him of the layoff, Monton informed Pomeroy of work that he was doing, and Pomeroy (either before or after consultation with Trucks) rescinded the layoff as to Monton.

Moreover, Pomeroy admitted that Smith was familiar with Clark's files and the status of Respondent's programs, so that it could easily have waited until Monday morning before implementing a layoff, and asked Smith to go through Clark's files to see how much work could be performed absent the presence of Clark and Belongia.[23] Yet, Respondent did not do that, but instead ordered that two employees be laid off, at a time when it did not even know whether the employees already had assignments for Monday that could be performed without Clark or Belongia on the job.

I am persuaded that this hasty and ill conceived decision was clearly a reaction to the distressing news of the union victory in the election, plus the fact that Smith was and admittedly leading supporter of the Union.

I have considered the memos submitted by Respondent which were written by Clark in March. Respondent argues that this evidence which demonstrates that Trucks overruled Clark's recommendation to lay off Monton because of the number of unfinished jobs, shows that Respondent was reluctant to lay off anyone, and that it was forced to so only because of the absence of Clark and Belongia on April 28. I disagree. While I agree that this evidence does demonstrate that Respondent was reluctant to lay off anyone, and that it had a number of unfinished jobs, I do not believe that it demonstrates that Respondent "had no choice" but to do so on April 28 because of the absence of Belongia and Clark. What it does demonstrate is that there was plenty of work available for smith to perform, and that Resodent was reluctant to lay off anyone as evidenced by Truck's comments in the memo, "down time and layoffs are not good decisions." Yet on April 28, it decided to lay off two employees without even knowing or making any effort to determine what work had either been assigned to or could be performed by Smith (or Monton). Accordingly, I am not convinced that Respondent would have taken the same action against Smith, ab-

[23] In this connection, Pomeroy testified that had Smith been aware of other jobs that could be performed he should have said something about it when Pomeroy informed him about the layoff, as in fact Smith did with regard to the one job that Respondent allowed him to finish. This argument misses the point. The issue is why Respondent made its decision, and whether it would have taken the same action absent Smith's protected conduct. Thus, what Smith said to Pomeroy after the decision was implemented is not determinitive in assessing Respondent's motivation.

sent the results of the union election and Smith's advocacy for the Union, including his testimony at the hearing. Therefore, I find that the layoff of Smith is violative of Section 8(a)(1), (3), and (4) of the Act.

5. The extension of Smith's probation

a. Facts

By a memo dated April 30 from Trucks to Smith, Respondent extended Smith's probation for the next 90 days. The memo states that his immediate supervisor left without providing an interim or 6-month evaluation requesting a change in status. The new weatherization director, according to the letter will evaluate his job performance and make a recommendation as to his continued employment.

Smith testified that his probationary status ended in his view on March 20, 6 months from his starting day of September 20, 1994.

Clark testified that although she had not completed the evaluation of Smith before she quit, she had been working on it, and would have rated him an excellent employee. She did not testify, however, that she had ever communicated her opinion of Smith's abilities or what her evaluation of Smith was going to say, to Trucks or any other official of Respondent.

Trucks testified, unrebutted by any evidence from the General Counsel, that Respondent's normal policy is to extend the probationary period of employees, when the required evaluations have not been completed within the initial probation period. In that connection, Respondent submitted memos from Trucks to supervisory employees, Melba White, Paula Clark, and Mary Jo Klomp, dated April 13 and 27, respectively which extended the probationary periods of these three individuals for 90 days, because an evaluation had not been prepared evaluating their performance.

b. Analysis

In view of the timing of this action with regard to Smith, coupled with the previously found discrimination against Smith, I conclude that a prima facie case has been established that a motivating factor in this decision of Respondent was Smith's protected activities.

However, I conclude that in this instance Respondent has satisfied its burden of persuading me that it would have taken the same action, absent Smith's protected conduct. Thus, Trucks' unrebutted and credible testimony establishes that Respondent's normal practice is to extend the probationary periods of employees whose evaluations had not been completed prior to the expiration of 6 months of employment. Moreover, Respondent demonstrated that it extended the probationary periods of three supervisory employees for the same reasons. Thus, I am persuaded that Respondent has established that it would have extended the probationary period of Smith, notwithstanding his protected conduct and Respondent's animus towards such activity. Therefore, I shall recommend dismissal of this allegation of the complaint.

6. The discharge of Smith

b. Facts

On May 4, Smith finished up the one job that Respondent had permitted him to complete in the morning, and then reported to the Scottville office where he performed the necessary paperwork. On that same day, Smith had received a call from an individual named Sandra Fraley who asked Smith about a job that Respondent was supposed to perform on a mobile home for an individual named Darlene Pietz. Apparently Dietz was homeless and was living with Fraley at the time. Smith replied to Fraley that he was only working temporarily that day, and was laid off. Therefore, he could not help her. Finally asked, "[W]hat are we supposed to do"? Smith suggested they call their "representative" or talk to Mary Trucks.

Subsequently, Trucks received a call from a representative from Lutheran Social Services who informed Trucks that he had received a complaint from Sandra Fraley that Smith had told her that Respondent was not going to be able to help Darlene Dietz. According to Trucks, this information demonstrated that Smith appeared to have violated a FiveCAP policy of confidentiality that prohibits client employees from speaking to a nonclient about a client of Respondent,[24] and that Smith was unduly alarming clients.

At approximately 1:30 p.m., Smith was summoned to Trucks' office. Trucks began the meeting, which was also attended by Pomeroy, by pointing her finger at Smith and asking, "[W]hy are you spreading inappropriate information?" Smith replied that Trucks had better "choose her words carefully," talk to him "civilly" and not call him "any names."

Trucks responded that she had not called him any names, nor belittled him. Smith conceded that Trucks had not called him any names yet, but that he wanted a civil conversation because he had been told by Paula Clark what to expect from Trucks.[25]

Trucks explained to Smith about the call that she had received concerning Smith's discussion with Fraley, and she asked him if he had discussed a client's problem with Fraley (a nonclient)? Smith admitted that he had spoken to Fraley about Dietz' problem, since Fraley had called him and asked about when Respondent was going to be able to complete a mobile home for Dietz. He also admitted that he told Fraley that he was on lay off, was only working temporarily, and there was no one to help.

Trucks asked Smith why he was discussing Dietz' problem with Fraley, and was he aware that he was violating Respondent's confidentiality rule? Smith explained that Fraley "had more upstairs" than Dietz. Trucks asked if Dietz was present with Fraley during the conversation? Smith answered, "[Y]es," and Trucks asked why he had not asked Fraley to put Dietz on the plane? Smith then got agitated, accused Trucks of hassling him and being childish.

Smith added that he knew why Trucks had brought him up to her office, and that she intended to fire him. Smith asked if she was going to fire him. At first Trucks did not give an answer to this inquiry and continued to criticize Smith for violating agency policy and making inappropriate comments. Smith again gave his explanation that Fraley had "more upstairs" than Dietz. Trucks pointed her finger at Smith, and asked why he was discussing one client with someone else. Smith at that point asked again if Trucks was going to fire him, and if so, asked her to put it in writing so he can leave. Trucks responded, "[Y]ou are going to be fired, but not right now." Trucks then asked if he thinks "I need you?" Smith answered

[24] In that connection, Respondent cites p. 16 of Respondent's "Policy Manual" which states that "employees are not allowed to discuss clients or information outside of appropriate agency staff, unless it is determined to be in the interest of assisting the client."

[25] As noted above, Clark had informed Smith that Trucks intended to terminate employees, such as Smith, who testified at the hearing.

that he knew knows that Trucks doesn't need him, but FiveCAP needs him and the clients need him because he was the only one who knows where jobs are at, and the progress of the various jobs.

Smith added that "he was the best damned inspector" that Respondent ever had, while leaning forward and pointing his finger at Trucks. Trucks told Smith to leave the building and the conversation was over. Smith asked again about his status and wanted to know if he was fired or laid off? Trucks refused to answer this question and again ordered Smith to leave the building. Smith responded that it was a public building and he would not leave until he gets a determination of his status. After one more similar exchange between Trucks and Smith, Trucks instructed her secretary to call the police.

At that point Smith walked over to the door to leave, and while pointing his finger at Trucks, said, "[W]e'll be in touch." Once again Trucks asked if Smith was threatening her? Smith replied, "[Y]es, with a lawsuit," and walked out.

That same day Respondent sent Smith a letter stating that he was terminated because during the meeting he was belligerent insubordinate, had verbally threatened Trucks, and refused to leave the office and the building until the police were called.

According to Trucks, her decision to terminate Smith was based solely on his conduct at their meeting of May 4, and that it had nothing to do with any union activities of Smith. Trucks asserts that she had no intention of discharging Smith when she called him into the meeting, and if he conducted himself properly, he would not have been terminated. When asked on cross-examination, at what point during this meeting did she decide that Smith was to be fired, Trucks was somewhat evasive, but finally responded that it was when Smith lunged across her desk and pointed his finger at her. Trucks testified that at that point she thought that Smith was going to hit her, and although he did not do so, she was no longer going to talk to him. Up until that point, Trucks claims it would have been simply considered her to be a misunderstanding, and a flaring of tempers, since as Smith himself pointed out, Respondent needed him.[26]

b. Analysis

Once again, a strong case has been established that a motivating factor in Respondent's decision to discharge Smith on May 4 was protected union activities. Thus, as noted above, Respondent unlawfully threatened to terminate employees who testified on behalf of the Union at the representation hearing, and specifically singled out Smith as one of the employees whom it could no longer trust us a result. Moreover, Respondent unlawfully moved Smith's office, and then on the same day of the election in which he acted as an observer for the Union, unlawfully laid him off.

Thus, in light of the strong case established by the General Counsel, Respondent has a substantial burden to meet to overcome such a case, by proving it would have taken the same action, absent Smith's protected conduct. *American Wise*, supra; *Vemco*, supra.

I conclude that Respondent has fallen short of meeting its burden in this regard. Tucks testified that Smith was terminated solely based on his conduct during this meeting. The discharge letter cited various specific acts of misconduct, including that Smith was allegedly belligerent, insubordinate,[27] had verbally threatened her, and his refusal to leave the building until the police were called. I note that Respondent has failed to show that it ever discharged or even disciplined any employee for any of the acts of misconduct allegedly committed by Smith. *10 Ellicott Square Court Corp*., 320 NLRB 726 (1996); *New Jersey Bell Telephone Co*., 308 NLRB 277, 283 (1992); and *Phillips Industries,* 295 NLRB 717, 718 (1989). "Under *Wright Line*, an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for imposing discipline against an employee, but must show by a preponderance of the evidence that the action would have taken place even without the protected conduct." *Hicks Oils & Hicksgas,* 293 NLRB 84, 85 (1989), cited in *New Jersey Bell*, supra.

It is true that Smith was somewhat defensive, and somewhat belligerent during the meeting, and I agree with Respondent's observation that Smith went into the meeting believing that he was going to be fired. However, I conclude that record amply justified that Smith's fears were well founded, in view of Respondent's prior discriminatory treatment of him, and Clark's warnings to him about Trucks' intentions to terminate union supporters. Moreover, it is clear and I find that Trucks was aware of the basis of Smith's fears of discharge, particularly since Smith told Trucks in the early part of the meeting that Clark had told him what to expect from Trucks.

Thus, Trucks' reaction to Smith's fears of being discharged, do not support Trucks' assertions that she had no intention of terminating Smith but merely intended to discuss with him his conduct with regard to the Fraley incident, as well as other problems. If that had been the case, one would expect that when an employee expresses a reasonably grounded fear of discharge, that an employer who had no such intention, would simply assure the employee that it did not intend to discharge the employee, but simply wished to discuss with him some problems with the employee's performance. Not only did Trucks fail to give such assurances to Smith, but on the contrary reinforced Smith's reasonable fear of discharge, by at first refusing to answer Smith's inquiry, and then on being processed by Smith, told him that she will discharge him, but not now. This is not the kind of reaction of an employer truly interested in retaining an employee, and merely attempting to discuss Smith's performance, as Trucks professes.

Rather, Trucks' conduct at the meeting including her pointing her finger at Smith fist, as well as her failure to assure Smith of his status, appears to me to have been calculated to provoke a response that would allow Respondent to discharge Smith. *Teskid Aluminum Foundry*, 311 NLRB 711, 720 (1993); *Circuit-Wise Co*., 308 NLRB 1091, 1109 (1992).

Moreover, I did not find convincing Trucks' claim that she felt physically threatened by Smith's actions of leaning over her desk and pointing his finger at her. I note that Smith made no attempt to hit Trucks, and Pomeroy was present in the room. I doubt that Smith would hit Trucks in Pomeroy's presence, and I

[26] The above description of the events during the meeting of May 4 is based on a compilation of the credited testimony of Smith, Trucks, and Pomeroy. I would note that in most significant respects, the testimony of all witnesses is essentially the same. To the extent that there were differences in the accounts of the meeting by the three witnesses, my findings are based on comparative demeanor, considerations, and my assessment of the probabilities of the particular event.

[27] In that connection, the letter cited Smith's alleged actions of "daring me to fire you."

further doubt that Trucks believed that Smith was going to do so.

Respondent also asserts in its discharge letter, and in Trucks' testimony that part of the reason for the discharge was Smith's statement that he would "be in touch" which Respondent allegedly interpreted as a threat, and Smith's refusal to leave the premises until the police were called. However, these assertions do not withstand scrutiny, inasmuch as Trucks admitted on cross-examination that she made up her mind to discharge Smith, when he lunged over her desk and pointed his finger at her. That conclusion is reinforced by her decision to cut off the conversation and ordering Smith to leave, which demonstrates that she no longer indented to retain him as an employee. Moreover, when Smith refused to leave he did so only because he wanted to know about his status. Yet, Trucks refused to assure him that he was not fired, and simply ignored his request for a simple answer as to his employee status. Therefore, whether or not Smith's statement that he would "be in touch" can or was reasonably construed by Respondent to be a threat of physical violence,[28] neither that conduct or Smith's admitted refusal to leave, can be considered as part of Respondent's reasons for discharge, since these events occurred after Trucks had decided to terminate Smith.

Finally, I note that Respondent terminated an employee, who it admitted that it needed very badly, without even the issuance of a warning, suspension or some other lesser form of discipline, for engaging in the conduct by Smith which it claims motivated its actions. I believe that absent its animus towards the Union in general and towards Smith in particular, for his prominent role in the Union's success, at best Respondent would have issued some lesser form of discipline against Smith. Accordingly, based on the foregoing, I conclude that Respondent has not met its burden of establishing that it would have terminated Smith, absent his protected conduct, and that it has therefore violated Section 8(a)(1), (3), and (4) of the Act by such action.

7. The alleged discrimination against Marva Taylor

a. Facts

Marva Taylor began her employment with Respondent on April 14, 1993. She was employed as the head cook at the Fountain Head Start Center. Taylor signed a card for the Union in January 1995, attended union meetings, and passed out union literature to other employees. Taylor also testified at the representation hearing on behalf of the Union and was one of the Union's observers at the election on April 28.

Taylor was an outspoken employee who during 1995, made numerous complaints to her supervisor, Kate Hardigan, as well as to other employees, that she (Taylor) believed that Respondent had treated her unfairly with respect to denials of her vacation requests and other matters, because she was a supporter of the Union. In that connection, a memo from Kate Hardigan to Melba White dated April 5, which appears to reflect a conversation between Hardigan and White regarding Taylor, which came from Taylor's personnel file, was introduced into the record. The memo reads as follows:

TO: Melba White, Administrative Assistant
FROM: Kate Hardigan, Head Teacher, FCDC
DATE: April 5, 1995
RE: 3/31/95 Conversation Marva Taylor

On Friday, March 31, 1995, we discussed, among other things, F.C.D.C's head cook, Marva Taylor.

I told you that Marva is pro-union, but I don't think her opinion is swaying other staff members' opinions. I explained that she supports the union because she believes they will protect her from persecution form Five CAP's administration.

She has told me she feels she is being "picked on" because she is pro-union. This "picking on" is done by having vacation denied with no explanation, excessive scrutiny of her books in comparison to other cooks, and inconsistencies regarding her assistant's hours.

I also told you she thinks it might be because she is White-American.

I have suggested to her that she seek other employment, and that she discuss her complaints with her supervisor.

Hardigan also informed Taylor that she had written the above memo to White, and gave Taylor a copy of same. Hardigan told Taylor that she (Hardigan) had received a call from White inquiring about whether Taylor had been doing any complaining about her not getting vacation time.

On or about April 6 Taylor was given a memo from White, dated April 4, covering three areas. They were entitled, "Action Detrimental to the Interest of the Agency, Poor Job Performance, and Response to Vacation Request."

The memo states that "it has been brought to my attention that you are complaining to the Head Start staff because your vacation request was denied. As you are aware, this type of behavior is unacceptable, yet you persist. Complaints like grievances are to be directed to your supervisor only, not other employees."

The memo then goes on to criticize Taylor for her performance in other areas, such as errors in recordkeeping, and the failure to submit a job evaluation for employee Rhonda Peters. The memo indicates that "based on the above information, you are placed on probationary status for up to thirty (30) days, subject to a performance evaluation."

On May 1 Taylor received from White, a performance evaluation dated April 5, along with a memo stating that White was directed not to give the evaluation to Taylor" until after the union elections so as not to allow any wrong interpretation of my intentions." The memo states that based on the evaluation, Taylor was "placed on probation with recommendation for termination in the absence of immediate and complete corrective action on your part."

The performance evaluation criticized Taylor's work in several areas, such as menu planning, menu preparation, inventory control, kitchen management, sanitation, supervision, documentation (record keeping), as well as a section designated as other. Under that section the evaluation states that Taylor refuses to accept that the agency can approve or deny requests for time off or vacation, and that she "continues to express negative attitudes."

White testified that she had spoken to Taylor about the various items in the evaluation on prior occasions, including some discussions in 1994. In that regard, White met with Taylor on October 4, 1994, to discuss problems relating to Taylor's performance, which were reflected in memos from White to Taylor dated October 4 and 17 relative to these matters. The

[28] In that connection, I note that Smith clarified that the statement referred to a threat of a lawsuit.

memos reflect criticism of Taylor's attendance, inventory control, leaving work early, and gave reasons why her requests for time off were not approved. In December, Taylor met with White, Andy Brown regarding problems with Taylor's November kitchen report and missing inventory. A memo dated December 21, 1994, was prepared by White and given to Taylor which reflects these discussions, and Respondent's criticism of her performance in this area.

White testified that based on the numerous problems with Taylor's performance that she eventually enumerated in the performance evaluation, she recommended to Trucks that Taylor be terminated. Trucks according to White decided that Respondent would instead place Taylor on probation with a recommendation for termination if there is no improvement.

At some point, undisclosed by the record, Taylor resigned from Respondent.

White also testified that she did not know if Respondent had ever placed a long-term employee on probation with a recommendation for termination. This was the first time that White had ever taken such action in her brief tenure as head start administrative assistant.

b. Analysis

Once more a strong case of discriminatory motivation has been established with respect to Respondent's treatment of Taylor.

Thus, as in the case of Smith, who as noted above, I have found discriminated against in several ways, Taylor was an observer for the Union at the election, and testified at the representation hearing on behalf of the Union. Moreover, Kate Hardigan and Melba White discussed Taylor's prounion sympathies on March 31, resulting a memo from Hardigan to White dated April 4, detailed their conversation with, the words "Marva is pro-union" circled, and which reflects that Taylor supports the Union because she believes the Union will protect her from Respondent's persecution. The memo further reflects that Taylor feels that she is being picked on because she is prounion, by denying her vacation requests, excessive scrutiny of her books, and inconsistencies regarding her assistant's hours. Finally, the memo reflects that Hardigan suggested to Taylor that she seek other employment and discuss her complaints with her supervisor.

The very same day this memo was prepared, Respondent issued a letter placing Taylor on probation pending evaluation, which led to the evaluation being given to her on May 1, which extended her probation with a recommendation for termination in the absence of immediate and complete corrective action.

Thus, the suspicious timing of Respondent's action, coupled with the other above-described evidence of animus towards the Union, and the contemporaneous discriminatory treatment of Smith, are more than sufficient to prove that protected conduct of Taylor was a motivating factor in Respondent's decision to place her on probation with a recommendation for termination.

The burden then shifts to Respondent to prove that it would have taken the same action against Taylor, absent her protected conduct.

Respondent did present some evidence in support of such a finding, particularly the facts that Respondent had been critical of some aspects of Taylor's work performance prior to the appearance of the Union. However, I am not persuaded that Respondent has met its burden of proof. I note initially the absence of any evidence that Respondent has ever taken similar personnel action against any employee in the past. *10 Elliott*, supra; *Hicks Oils*, supra.

More importantly, however, I conclude that Respondent's own memos demonstrate that one of the reasons for the disciplinary action was Taylor's engaging in clearly protected concerted activity. *Avery Leasing Co*., 315 NLRB 576, 580 (1994).

Thus, it is apparent from an examination of these memos, that Respondent placed Taylor on probation, in part because she continued to violate Respondent's instructions not to complaint to other employees that Respondent was treating her unfairly in various respects, including denial of vacation time because she was prounion. The April memo from White to Taylor mentions White's dissatisfaction with Taylor complaining to other employees because her vacation request was denied, and states that "complaints like grievances are to be directed to your supervisor *only*, not other employees." Hardigan's memo to White concerning makes clear that White was aware that Taylor had been attributing Respondent's actions towards her to the fact that she was "prounion."

These complaints by Taylor to other employees constituted protected concerted activity, whether or not Taylor was correct in her assertion that Respondent treated her unfairly because of her union activities. The statement made by Taylor that she believes that her union activity motivated Respondent's towards her is, of itself protected, concerted activity. *Bryant & Cooper Steakhouse*, 304 NLRB 750, 752 (1991); Cf. *Hertz Corp*., 316 NLRB 672, 692 (1995).

Moreover, even apart from Taylor's mention of her union activity, her complaints to other employees about working conditions is protected concerted activity. Indeed Respondent's assertions in White's memo to Taylor that complaints like grievances are to be directed to supervisors only and not to other employees is itself an unlawful promulgation of a rule which is violative of Section 8(a)(1) of the Act, inasmuch as it inhibits employees from engaging in their Section 7 rights of discussing matters regarding their terms and conditions of employment. *Communication Workers,* 303 NLRB 264, 272 (1991); and *Kinder-Care Learning Centers,* 299 NLRB 1171 (1990).

Therefore, there is doubt that at least one of the reasons for Respondent's decision to place Taylor on probation was her protected concerted conduct of complaining to other employees that her treatment by Respondent was motivated by her union activity. Since Respondent has not established, and indeed made no effort to even argue that it would have taken the same action against Taylor, absent this protected conduct by Taylor, it follows that it has not met its *Wright Line* burden.

Accordingly, I conclude that Respondent has violated Section 8(a)(1), (3), and (4) of the Act by placing Taylor on probation with a recommendation for termination.

8. Respondent's actions with regard to the petition, including the discharge of Verna Fugere

a. Facts

As noted above, Paula Clark resigned her employment from Respondent on April 28. Sometime in mid-May, Clark along with a group of other individuals, which included other former employees of Respondent, clients of the agency, contractors, and current employees, decided to prepare and circulate a petition calling for the removal of Trucks and Pomeroy. The main concern of the group which gave rise to the petition, were the belief that Respondent was spending money to keep the Union

out, that should have gone into programs or salaries, that employees were being terminated and not replaced, and that employees were being harassed because they testified at the hearing. The group called itself the "Concerned Citizens for a Better FiveCAP." The petition that was prepared was to be signed by residents of the four counties covered by Respondent, and asked the board of directors to remove Trucks and Pomeroy "for improper management and breach of fiduciary duties."

Clark as well as other members of the group circulated the petition among employees of Respondent. Additionally, starting in June, and during the summer and early fall, the group engaged in picketing of Respondent's Scottville office, as well as some county offices. The picket signs referred to various items such as the number of unfair labor practice charges, the high employee turnover, intimidation and abuse of employees, and the fact that Trucks had claimed in the press that there had been budget cuts, but had just received a $10,000 raise. No current employees were picketing. However, employees who had been discharged by Respondent including Smith and Tom Belongia were among those picketing.

The dispute came to the attention of the local press, resulting in two newspaper articles, written by Patti Bogls of the Ludington Daily News, which appeared in the paper on June 1 and 19.

The June 1 article refers to the petition, and to a quote by Clark that the group hoped to obtain 10,000 signatures and that a personal ad placed by Dagmar Miller, another former employee requested people who had been fired or quit Respondent to call. The article quoted Miller to the effect that she had received a response from 30 exemployees who complained about the agency's management.

The article also quoted Smith, who as noted had recently been fired, who stated that "Trucks continually fires people or coerces people out of there and clients that are in need of something have gone without." Smith adds that he was in favor of the petitions and "hopes they'll do some good."

The article also makes reference to the unfair labor practice charges that the Union filed, and asserts that Smith and Miller are among at least three employees who are claiming discrimination based on union representation.

Harold Madden, a board member, was quoted as stating that he was aware that some workers were not happy with Respondent, but said, he went to see evidence.

The article then indicated that Trucks said she believes the allegations are being made because of the Union. In quotes, the article attributes the following to Trucks. "It's a Union ploy to strengthen their position," Trucks said. "They do not want to bargain. They have not asked to bargain."

Trucks was also quoted as mentioning that similar allegations had been made against Respondent in the past, and that Respondent was "monitored and audited and there were no findings."

Further, the article mentioned one of the problems cited by the group as an "outrageous turn-over rate." Trucks responded to this charge by disagreeing that the turnover is too high, and stating that "our mission is to hire people in, give them the opportunity to learn skills and move on." We do no promise anyone a job beyond a contract period and we do not promise annual raises. You will have a job as long as you are doing the job and we have the funding."

The June 19 article was accompanied by a picture of former employees of Respondent and their supporters picketing in front of the Scottville office, with signs which among other items, refer to unfair labor practice charges. This article refers to the fact that seven such charges had been filed, and quotes Union Business Agent Marv Holland as stating that he never had to file this many charges against anyone.

In response, Trucks was quoted as stating that others, including her attorney, have suggested the charges, along with an employee petition calling for her removal, could be part of a union ploy for bargaining. A direct quote from Trucks was included as follows. "We were told before the election, their strategy was not to negotiate, but to get me fired."

Holland denied that claim, and asserted that the unfair labor practices were not a bargaining tool, and denied that the petition was union orchestrated or organized. Holland did say, "[B]ut we are not opposed to it."

The article referred to the petition and indicated that the group asked for the removal of Trucks Pomeroy, because employees are not treated fairly and some of the agency's clients are not receiving the assistance they should be. Clark was also quoted as stating that those picketing were "completely separate (from the Union)." The article also quoted some of the picket signs as stating "employee harassment and abuse," and "do you know how your tax dollars are being spent."

Trucks was asked about these articles, and in somewhat evasive and uncertain testimony, denied that she told the reporter that the petition was a union ploy or that the Union was behind or involved in the petition. According to Trucks, the reporter asked her whether she thought the Union was involved, and informed her that Holland had denied any involvement. She asserts that she responded that if the Union involved in the petition, then she believed that it was a ploy to strengthen their bargaining position, since it had not as yet contacted Respondent to bargain. Trucks did admit, however, that she "thought it was very plausible that the Union could be involved." Trucks also admitted that the reporter told her that the group involved with the petition was concerned that services are not being provided because all those people had been fired, that Trucks was asked what she had to say about that. Trucks also confirmed that the reporter said something to her about Dale Smith who had been fired and claimed that people were not being served in the weatherization department as a result.

On as noted above, about May 25 or 26, Clark gave a copy of the petition to Verna Fugere. Fugere was a community support worker at Respondent's Mason County office since August 8, 1988. Clark asked Fugere to circulate the petition amongst other employees. Fugere gave copies of the petition to several employees, including Norma Johnson, Karla Clegg, and Tom Belongia. Fugere and the other employees discussed the petition and stated that they felt that it was the only way that they were going to be able to protect their jobs, because unless Trucks was removed as director, there would be no jobs left for the Union to unionize. According to Fugere, in the past there were several other attempts to unionize Respondent, and when those attempts became common knowledge to Trucks, employees were either fired or coerced to quit.

According to Trucks, she first found out about the petition on or about May 31, when she received a phone call from employee Norma Johnson, who told Trucks that she had received a copy of the petition and was asked to distribute it. Johnson told Trucks that she had only good experiences with Trucks, and felt that she had an obligation to tell her about it. Johnson read the petition to Trucks and told Trucks that she had received it from Clark. Trucks asked Johnson to put that in writing. Johnson

replied that she was afraid to, since she was from Manistee which is a union town and she heard stories about things that happen to people who were considered snitches by the Union. Eventually, after another call, Trucks persuaded Johnson to come in to the Scottville office, discuss the matter personally with Trucks, and put her assertions in writing.

Thereafter, on May 31 and on several days thereafter, Trucks spoke to all head teachers, community support workers, and any other employee whose name came up in her discussions with employees concerning the petition. Trucks taped all of these conversations, after notifying the employees that she was doing so.

Trucks spoke to Fugere, because Johnson in her discussion with Trucks had informed Trucks that Fugere had called her into the office and told her that she would be hearing from Clark about the petition, and requested that she assist Clark in regard to the petition. Another employee, Collette Kleg, had also told Trucks that Fugere had given her the petition and asked her to obtain signatures.

On May 30 Mary Jo Klomp delivered a copy of the petition to Beverly Schaub in the parking lot of Respondent's Lake County office in Baldwin, where Schaub was employed as an assistant community support worker. Schaub put the petition in her purse and went in to work. While at work, Schaub started to pull out the petition to show it to Ann Walters, the community support worker for that facility and told Walters that she had received the petition from Klomp. Walters instructed Schaub to put the petition back in her purse, since a client was coming in, and they should not talk about the petition during working hours. Schaub complied and they did not thereafter have any further discussion about the petition.

The next morning, May 31, Walters was summoned by Trucks' secretary to report to the Scottville office as quickly as possible. At 10:08 a.m., Walters was called into Trucks' office. Pomeroy was also present. Trucks showed Walters the petition, and asked if she had seen it? Walters replied that she had seen it, but had not read it. Walters also told trucks that she had received it from Schaub, and that she thought that Schaub received it from Mary Jo Klomp. Trucks asked Walters, "[W]hat do you think the purpose of giving you this petition was?" Walters replied, "I would imagine they were hoping that we were upset about working conditions or something that has happened to us and would be willing to circulate the petition." Trucks also asked if Walters discussed the petition with Schaub, whether she (Walters) was expecting the petition, and whether anyone asked her to circulate the petition. Walters replied no to all of these questions.

Trucks asked Walters if she was aware of an agency policy that employees are not allowed to distribute materials or circulate any petitions without prior permission? Walters answered, "[Y]es." The meeting concluded with Trucks cautioning Walters of the seriousness of this action, and directed her not to discuss the conversation with anyone, because it is under investigation.

At 11 a.m. Trucks brought Fugere into her office with Pomeroy present, and proceeded to interrogate Fugere as to whether they had seen the petition, who received it from, when she received it, whether she read it, whether she reported it, why she did not report it, whether she considered signing it, whether she considered consolidating it, who else she spoke to about the petition, who else she gave the petition to, whether she thought the petition was good for FiveCAP, and whether she was aware of any evidence to support the petition. Fugere responded to the questions, and admitted that she had seen the petition, had discussed it with and given it to other employees, had considered signing it and circulating it to others, and had no intention of reporting the petition to management. Fugere was cautioned by Trucks of the seriousness of her conduct, advised her to consult an attorney, and directed her not to discuss the conversation with anyone.

Schaub was also called into Trucks' office on that day and asked similar questions about her involvement with and knowledge of the petition. Schaub was also told that she should have reported the petition to Respondent when she became aware of it, and that as a result she might be put on probation or fired for her failure to do so. Trucks instructed Schaub that Respondent would notify her of its decision concerning her status.

At 4 p.m. on May 31 Tom Belongia was also called into Pomeroy's office and asked similar questions about the petition. Belongia was at first reluctant to discuss the petition, since it did not in his view have anything to do with his job. Belongia finally did admit to having seen it, but would not answer other questions of Pomeroy. Belongia did say, however, with respect to the petition, "[M]y personal opinion, this would probably do the agency some good." Finally, Belongia insisted on speaking to Trucks about the subject, which resulted in a long discussion between the two of them.

During this discussion, Belongia continued to resist discussing the petition, since he felt that what he did on his own time was his business. Trucks informed him that if something affects Respondent, she has a right to discuss it with him, whether or not it takes place on his own time, and if he refuses to talk to her about it, he will no longer be on the payroll.

Trucks directed herself to Belongia's comment to Pomeroy that the petition "would probably do the Agency some good," and asked what about the petition would be good for the agency. Belongia did not directly respond, and continued to insist that his personal opinion is his business. Trucks replied that his opinion does matter and that he had an obligation to report his knowledge of the petition to his supervisors. She adds that if his position is that he need not have reported the petition because it was his personal business, "you don't work here anyway."

Trucks asked Belongia how he felt about the petition? Belongia replied, "[T]oday I'm going to run out and sign the damn thing." After another inquiry about whether Belongia would circulate or sign the petition, Belongia replied that he would not sign unless there was proof that something is wrong. Trucks then asked what Belongia would do in the future, should something like the petition be brought to him? Belongia replied, "[I]f I see something detrimental to the Agency, I would be happy to tell you about it. You're got to remember Mrs. Trucks, that it's Union."

After further discussion about why Trucks felt it was essential for Belongia to have reported his knowledge of the petition to supervision, and Belongia refusing to unequivocally agree to do so in the future, Trucks asked if felt that way, "don't you think now is a good time to go?" Belongia replied that in a month he might have another job.

Belongia also mentioned that Clark had informed him that Trucks labeled him as a "union Organizer," and complained that Respondent had instructed him because of this fact. Belongia made specific reference to Respondent having moved his office to the basement. Trucks informed Belongia that she had

called him into the office to fire him, if necessary, and that she should not have anyone working for the agency who is not loyal to the agency, and who fails to fulfill his responsibility to report something detrimental to the agency. Trucks told Belongia that she would give him 30 days to find another job, on the condition that he agree to report anything that is critical of FiveCAP. Trucks added that if he crosses the line and he finds out that he has not kept his word, "it will be short and sweet. You can make a fast track to Union and file unfair labor practices,[29] because I can assure you, your ass is grass. And I'm warning you I will not tolerate it."

After being asked of by Trucks if he felt that he did anything wrong, Belongia replied that he had always been honest, and stated that he voted for the Union. Trucks answered that she didn't care whether he voted for the Union, and that she hopes the Union does him some good. Trucks added, however, you know what that means, let the Union look out for you. Can the Union keep you from being fired today?" Belongia replied, "[A]bsolutely not." Trucks stated, "[Y]ou've got that right." Trucks then went on to say that she knows the law, that she follows Respondent's personnel policies, that she has the authority to fire, and that Respondent does not fire people for nothing. She concluded by telling Belongia, "[Y]ou get fired for a reason. And if the reason is covered in our Personnel Policies, no Union can save you, you are gone."

Trucks denied that she believed that the petition had anything to do with the Union, or that the Union was involved in any way with the petition. According to Trucks, she was concerned about the petition because she viewed it as criticizing the agency for mismanagement of funds. Trucks added that her mind went back to 1988, when a similar petition was circulated, also calling for her ouster, which resulted in Congressional inquiries and an attorney general investigation, which although it exonerated Respondent, was not a pleasant experience. Trucks also testified that she was concerned that the petition was going to be distributed to Respondent's clients, and that its clients were very sensitive to assertions that she and the fiscal officer were mishandling taxpayer dollars.

Respondent, in support of Trucks' testimony, submitted newspaper articles from 1988, as well as two letters to the editor sent to newspapers in 1995. An article from the Manistee News Advocate, dated January 30, 1982, is headlined that Trucks is the target of an apparent ouster attempt. It described an effort by a group to have Trucks terminated for various alleged improprieties, including not following proper election procedures for board membership, and other alleged failures to follow Respondent's bylaws.

The article also indicates that the group complained that problems in the agency are evidenced by a turnover rate of 70 percent. Trucks responded to this criticism by defending such a turnover rate, that enables employees to "gain experience and then go on to bigger and better things." Trucks was also quoted as saying that "we call it up and out. Turnover in a community action agency is not that much of a problem . . . it's the mark of a community action agency, doing its job."

A letter to the editor printed in Ludington Daily News dated February 8, 1988, was also submitted. This letter written by a Cheryl Dore who identified herself as a former member of Respondent's management team, defended Trucks from the charges raised against her by the group in 1988. The letter praised Trucks for her efforts to institute accounting procedures and program controls. However, the letter also conceded that Trucks was difficult to work with and had high expectations for her staff to perform the job for which they were hired. Dore expressed the view that the above concessions do not make Trucks a "poor manager."

Another newspaper article dated November 16, 1988, details that an investigation by the Attorney General of the State of Michigan found that allegations against Respondent to "mismanagement of funds and programs is unfounded." The two letters to the editor printed in 1995 were written by Mary Jo Klomp, a supporter of the 1995 petition, and by Jan Bailey, chairman of the board of directors of Respondent in support of Trucks.

Klomp's letter refers to the fact that Trucks had stated that the petition was another "union ploy." For the record, Klomp stated that the union had nothing to do with the drive, but it was a grass roots movement instituted by former FiveCAP employees. Klomp referred to the fact that she had been terminated by Respondent, and was "one of a long list of personnel that had either quit or been terminated." The letter then goes on to assert that Trucks, "intimidates, humiliates and degrades employees until they quit or should they dare to question her absolute authority, are terminated for incompetence and/or insubordination." The letter concludes by arguing that Respondent could provide "better service with now only a full complement of employees but with employees who engaged and took pride in their work at Five CAP. It is also my opinion that this will never be a reality as long as Mary Trucks is executive director."

The letter from Bailey praised Trucks for her level of commitment that turned the agency around. The letter also referred to the fact that the agency was currently fighting for the funding for existing programs, and argued that rumors and allegations aimed at discrediting Respondent can only hurt the people that it serves. Bailey criticized the "selfish few" who have tried to take attention away from the positive impact that Respondent has made, which does not in her view, focus attention and energy on what is truly important, the people that Respondent serves.

On June 1, at 5 p.m., Fugere was shown a copy of a transcript of the discussion the previous day with Trucks concerning the petition by Pomeroy, who asked her to sign it. Fugere read it but said that she would not sign the document before seeking legal advice.

Five minutes later, Pomeroy instructed Fugere to go to Trucks' office. Trucks informed Fugere that she was fired and told her to get her things and get out. Fugere asked why, and Trucks responded that "it's all in there," referring to the typed transcript that Fugere had refused to sign.

Several days later, Fugere received a letter from Trucks, dated June 1, which explained the reasons for her discharge. The letter referred to the petition, and the fact that Fugere had admitted having seen and received it, giving it to another employee, and had failed to report the petition to her supervisor. Additionally, the letter mentioned that she had been directed not to discuss the meeting with Trucks with anyone, and that Fugere discussed the meeting and the petition with three other employees.

Accordingly, the letter concludes that Fugere was guilty of "gross insubordination," and actions detrimental to FiveCAP,

[29] I note in this connection that by this time the Union had filed charges on May 5 and 8, asserting that Respondent violated the Act with respect to its treatment of employees Taylor and Smith.

which are violative of Respondent's personnel policies, which warranted her discharge effective 5 p.m. on June 1.

In this connection, Respondent cites page 18 of its policy manual, which defines actions detrimental to the best interests of Respondent, as grounds for termination, which includes, "breach of staff confidence, public repudiation of the Five CAP Program or display of temperament, which impedes the continuous functioning of the Five CAP Program."

b. Analysis

In assessing the lawfulness of a number of actions taken by Respondent with respect to the petition seeking the removal of Trucks and Pomeroy, the primary issue for resolution is whether or not the employees were engaged in protected concerted activity with respect to their involvement with said the petition.

It is well settled that a petition or other conduct by employees which seeks the removal of a supervisor constitutes protected concerted activity, where the supervisor has a direct impact on employee working conditions. *Korea News, Inc*., 297 NLRB 537, 539–540 (1990); *Polynesian Hospitality Tours*, 297 NLRB 228 fn. 2 (1989); and *Hoytuck Corp*., 285 NLRB 904 fn. 3 (1987). This is so even where the employees seek the removal of a high-level management official, as long as the identity of the official is directly related to their terms and conditions of employment. *Oakes Machine Corp*., 288 NLRB 456 (1988), enfd. 897 F.2d 84, 89 (2d Cir. 1990).

Here the evidence establishes that major concerns of the employees who discussed and/or circulated the petition were the unfair labor practices committed by Respondent and the arbitrary manner in which Respondent in general and Trucks in particular treated its employees. I also conclude that Respondent was fully aware that these were at least some of the concerns of the employees that gave rise to their actions with respect to the petition.

Indeed, the very first employee that Trucks questioned about the petition, Ann Walters, told Trucks that the reason why employees were involved with the petition, was that employees might be upset with working conditions or something that happened to them at the job. Moreover, when Respondent questioned employee Tom Belongia about the petition, he expressed support for it by stating, "[I]t might do the Agency some good," and then went on to complain about how he had been unfairly treated by Respondent, mentioning specifically among other complaints, the moving of his office to the basement, which I have concluded above was an unfair labor practice by Respondent.

Most significantly of all, I note Trucks' own testimony given in connection with the newspaper articles describing the petition and her reaction to it. Trucks conceded that the reporter had told her that the group involved with the petition was concerned that services are not being provided because all these people had been fired, and that Trucks gave her response to that charge. Additionally, one of the problems cited by the group was an "outrageous turnover." Trucks responded[30] to allegations by disagreeing that the turnover rate is too high, stating that Respondent's mission was to have people, give them the opportunity to learn skills and move on and that no one is promised a job or annual raises. These comments by Trucks establish clearly that she was well aware that at least one purpose of the petition was to protest Respondent's personnel policies, how it treats its employees, and its inability to retain its staff. These are matters which directly relate to employees' terms and conditions of employment, and particularly, where as here, Trucks herself is directly involved in most if not all of the personnel actions taken by Respondent with respect to its employees, the employees call for her removal is protected conduct. *Oakes Machine*, supra; *Korea News*, supra; and *Hoytuck*, supra.

Respondent argues that its primary concern with the petition, was Trucks' belief that she and Pomeroy were being accused of embezzlement or mishandling money, which has no direct bearing on employees working conditions. In support of this contention, Respondent cites Trucks' testimony that she regarded this petition as similar to the petition circulated in 1988, which also called for her removal, and cited such concerns. However, an examination of the newspaper articles and letters to the editor by Respondent in connection with both the 1988 and 1995 petitions serves to reinforce my conclusion that at least one of the concerns of the 1988 as well as the 1995 petition involved working conditions of employees. Thus, the 1988 newspaper article indicated clearly the group was complaining about problems in the agency created by a turnover rate of 70 percent. Interestingly, Trucks defrauded the agency in 1988 in virtually the same language as she did in 1995, by stating that Respondent enables employees to gain experience and go on to bigger and better things. Moreover, a letter to the editor in 1988 from a former management employee, defended Trucks, but conceded that Trucks was difficult to work with and had expectations for her staff, which in the view of the writer, did not make Trucks a poor manager. Finally, the letter of Mary Jo Klomp sent in 1995, makes clear that the petition sought to remove Trucks because of how she treats her employees, by causing them to quit or firing them.

Thus, there can be no doubt, that Trucks was aware that at least one of the reasons for the circulation of the petition herein, was the belief of the employees (as well as ex-employees) of Respondent that Respondent in general and Trucks in particular mistreated its employees, causing a high turnover of staff. Thus, since at least one of the concerns of the employees involved their working conditions, the employees were engaged in protected concerted activity in connection with the petition. *Blue Circle Cement Co*., 311 NLRB 622, 634 (1993); enfd. 41 F.3d 203, 210 (5th Cir. 1994).

Moreover, I also conclude, contrary to Trucks' contrived and unconvincing attempts to distance herself from quotes attributed to her in the newspaper, that she did believe as quoted in the paper that the petition was a "union ploy," and that the Union was behind or at least involved with the petition. In addition to the newspaper articles, which I conclude quoted her accurately, I also rely on other evidence to support such a conclusion. Thus, I note that when Trucks was first informed about the petition by employee Norma Johnson, Johnson was reluctant to put anything in writing because she had a "union town" and was concerned about what happens to people considered snitches by the Union. These comments suggest that Johnson believed that the Union was involved in the petition, and that Trucks at that point was of the same view. Additionally, during Trucks' questioning of Belongia concerning the petition, Belongia made a comment to Trucks in regard to the

[30] I note that while Trucks in her testimony did dispute the accuracy of some of the quotes attributed to her in the article, she did not do so with respect to these comments, which I find that she made.

petition, "[Y]ou've got to remember Mrs. Trucks, that its Union," which also suggests union involvement in the petition.

While it is true as Respondent argues that Holland, Clark, and Klomp unequivocally denied any union involvement in the petition, whether or not the Union actually participated in the formation or circulation of the petition is not relevant. What is significant is that Trucks believed that the Union was involved, which by itself is sufficient to characterize the petition as protected conduct, *Byrant & Cooper*, supra, since action taken against an employee, was the mistaken belief by an employer that the employee engaged in union activity is unlawful. *Salisbury Hotel,* 283 NLRB 685, 686 (1987).

However, where employees in the course of their concerted activity, engage in conduct which is egregious, offensive, defamatory, or opprobrious, such activity can lose the protection of the Act. *HCA/Health Services*, 316 NLRB 919 (1995); *Consumers Power Co*., 282 NLRB 130, 132 (1986). A statement which is alleged to be defamatory is deemed sufficiently opprobrious as to lose the protection of the Act if it is made with knowledge of its falsity or reckless disregard of whether it was true or false. *HCA*, supra; *KBO, Inc*., 315 NLRB 570 (1994).

Here, the petition simply alleges that Trucks and Pomeroy were guilty of "improper management and breach of fiduciary duties." It is apparent that the employees were primarily concerned with Respondent's alleged mistreatment of employees, which clearly can be reasonably characterized as improper management, and can also be related to breach of fiduciary duties, since the employees claim that the lack of appropriate staff impacted adversely upon Respondent's ability to properly maintain its programs and service its clients.

I note that while Trucks may have believed that she was being implicitly accused of embezzling funds, there is no record evidence that anyone involved in the petition ever made such an accusation. Thus, I conclude that the statements on the petition and the employees' actions in regard to it were based on reasonable good-faith belief that Trucks and Pomeroy were not managing the agency properly, and cannot be characterized as statements made with knowledge of their falsity or reckless disregard for its truth. *KBO*, supra (statement made that anti-union campaign was financed from employees' profit-sharing accounts, protected, even though statement inaccurate, and based solely on double hearsay statement which employee made no attempt to verify). See also *Alaska Pulp*, 296 NLRB 1260, 1273–1274 (1989) (Accusation that employer maintained two sets of books protected although no evidence that statement was accurate); Cf. *HCA,* supra (employee recklessly spread rumors about supervisor that were false and damaging, and which employee knew or should have known were false. Held such conduct lost the Act's protection).

Accordingly, I conclude that Respondent's employees were engaged in protected concerted activity with respect to their activities relating to the petition. This finding leads to the conclusion that a number of actions taken by Respondent in response to this petition are in violation of the Act.

Thus, Respondent's interrogating its employees in Trucks' office, concerning their actions with regard to the petition, as well as their knowledge of who else was involved with the petition clearly was coercive, and violative of Section 8(a)(1) of the Act. *Kroger Co*., 311 NLRB 1187, 1191 (1993); *Club Monte Carlo Corp*., 280 NLRB 257 (1986), enfd. 821 F.2d 354 (6th Cir. 1987).

Additionally, it is also clear that statements made by Trucks to various employees that threatened discharge and other reprisals against employees failing to report their awareness of the petition and other actions in regard to the petition are unlawful threats in violation of Section 8(a)(1) of the Act. *Clean Power, Inc*., 316 NLRB 496, 498 (1995); *Krager,* supra at 1191.

Similarly, I conclude that Trucks' statement to Belongia during her unlawful interrogation of him concerning the petition, suggesting that he quit unless he promised to report such petitions in the future, is also an implied threat of discharge violative of Section 8(a)(1) of the Act. *Korea News, Inc*., supra at 540; *Heritage Nursing Home*, 269 NLRB 230, 231 (1984).

The complaint also alleges, and the General Counsel contends that Respondent by Trucks unlawfully promulgated and enforced an overly broad no-solicitation, no-distribution rule. I agree. When Trucks informed employees that they were prohibited from circulating petitions or materials without management approval, and that they were obligated to report any such activity, Respondent has enforced an unlawfully broad prohibition on employees' exercise of protected concerted activity, *Korea News*, supra at 540–541; *Communication Workers* , 303 NLRB 264, 277 (1991); *299 Lincoln Street, Inc*., 292 NLRB 172, 186 (1988), whether or not as Respondent asserts, such conduct would be violative of Respondent's longstanding personnel policies. *Kinder-Care Learning Centers,* 299 NLRB 1171, 1172 (1990) ("Parent Communication" rule that prohibits employees from communicating with coworkers or third parties such as parents or clients, and requires employees to bring any work-related complaint to management, interferes with employees' Section 7 rights to communicate with both coworkers and outsiders regarding their complaints about working conditions).

Finally, Respondent admits that it discharged Verna Fugere because of her failure to report her knowledge of the petition, as well as her actions in circulating the petition. Since the discharge was admittedly motivated by Fugere's activities, which I have found to be protected concerted conduct, it follows and I conclude that Respondent has violated Section 8(a)(1) and (3)[31] of the Act. *Simplex Wire & Cable Co*., 313 NLRB 1311, 1314–1317 (1984); and *Delta Health Center*, 310 NLRB 26, 43 (1993).

9. The discharge of Tom Belongia

a. Facts

As noted above, Belongia was a union supporter, testified at the hearing on behalf of the Union, and was the recipient of an unlawful threat by Trucks to discharge employees if the Union was voted in. Belongia was also specifically mentioned by Trucks as one of the employees whom she could no longer trust because of their testimony at the hearing. I have also concluded above that Respondent discriminatorily moved the office of both Belongia and Smith in violation of the Act.

[31] The 8(a)(3) finding is based on the fact that Trucks believed that the Union was involved with the petition. The General Counsel also contends that since Fugere was also a union supporter and testified at the hearing, that her discharge is also violative of Sec.. 8(a)(1), (3), and (4) based on these activities of Fugere. In view of my finding that the discharge, based on conduct with regard to the petition was unlawful, I need not and do not make a finding whether or not Fugere's discharge was also violative for these other reasons, inasmuch as the remedy would not be significantly different with or without such a finding.

Additionally, Belongia was one of the employees whom Respondent unlawfully interrogated about their activities with respect to the petition. During that unlawful interrogation, Belongia expressed sympathy for the petition, by stating that it might do the Company some good, and "today I'm going to run out and sign the damn thing." During that same discussion, I have found that Respondent unlawfully suggested that Belongia quit, because he would not agree to report his knowledge of any such future petitions.

On June 2 Respondent sent a memo to Belongia from Trucks, allegedly summarizing their meeting on June 1. The memo asserts that during the meeting, Belongia had stated that he planned to leave Respondent's employment in 30 days, and that the meeting ended with the understanding that he would continue his employment for 30 days at Respondent on the condition that he adheres to Respondent's policies and procedures (referring to Trucks' unlawful instruction to report any future petitions to management).

As noted above, this memo is not entirely accurate. Belongia did not indicate that he planned to leave in 30 days. However, he did respond, in answer to Trucks' unlawful suggestion that he quit, that he had applied for another position which he would accept if the offer was forthcoming, and that he would know about his prospects of obtaining this position in 30 days.

On June 7 Belongia was called into the office by Trucks at 5 p.m. Trucks while on the phone, gave Belongia a note requesting a report that she had assigned him the day before. Belongia who testified that he had understood that Trucks did not need the report until June 8, went to his office and returned with only a partially completed report. He gave the document to Trucks and informed her that he had to leave to pick up his 8-year-old daughter at a softball game by 5:30 p.m. Trucks replied that Belongia's report was not complete and he was not leaving. Belongia responded that he was leaving. Trucks then told Belongia, if he left "don't come back." Belongia left to pick up his daughter.

The next day, June 8, Belongia reported to work at his normal time, and as he attempted to sign in, Trucks grabbed the sign-in book and told them "I want you to leave." Belongia replied that if she wanted him to leave, he wanted something in writing, and asked if he was fired? Trucks did not reply to this inquiry, but repeated her demand that Belongia leave. Belongia responded that he was not leaving, and again demanded something in writing from Trucks. Trucks told her secretary to call the police, and indicated to Belongia that he would get something in the mail. To this comment Belongia stated, "bull shit," and added "I ain't playing your game Mary."

Belongia again asked if Respondent wants to fire him, to give him something in writing that tells him he is fired. Trucks continued to insist that Belongia will leave, and Belongia continued to refuse to leave unless he gets something in writing. Belongia then stated that he was going to get some personal things, and started to walk past Trucks. As he was side by side with Trucks, she grabbed his arm and told him that he was not going anywhere. Belongia replied that he had personal stuff in the building. Trucks grabbed Belongia's other arm and told him that he was "going to stay right here." Belongia at that point shouted, "Get your hands off me right now." Trucks then called for Pomeroy to come in, while still holding Belongia's arms. Belongia repeated that Trucks should get her hands off him, not to touch him, and added, "[G]et your damn him, not to touch him, and added, "[G]et your damn me."

Finally, a police officer arrived. Trucks informed the officer that Belongia had been asked to leave five times and refused to do so. Belongia told the police that he worked there. Trucks stated, "[N]ot anymore you don't." Belongia continued to demand something in writing that states that he doesn't work there, and that he needed to retrieve some personal things. The police officer, at Trucks' suggestion, told Belongia that he should make a list of his personal things, and that she (the police officer) would make sure he gets the stuff. However, she insisted that Respondent had the legal right to demand that he leave, and if he does not do so, he will be arrested. Belongia agreed to leave at that point.

The next day, June 9, Respondent sent a letter to Belongia, stating that he was terminated effective June 8. The letter reads as follows:

> Dear Tom:
>
> Effective June 8, 1995 your employment with FiveCAP, Inc. is terminated.
>
> On the above date you committed major breaches of the following FiveCAP, Inc. personnel policies:
>
> > Insubordination—such actions include, but are not limited to refusal to carry out directives of the FiveCAP Executive Director, immediate supervisor, or Program Coordinator.
>
> Actions detrimental to the best interest of FiveCAP, Inc. Program and people that it serves—such actions include, but are not limited to, breach of staff confidence, public repudiation of the FiveCAP Program or display of temperament, which impedes the continuous functioning of the FiveCAP Program.
>
> Violence, insults or threats of violence - Such actions include, but are not limited to, threats or assaults or carryout threats to assault employees, members of the staff or the Board of Directors of FiveCAP, Inc., or to be instrumental in any action which constitutes assault on employees, staff, or members of the Board.
>
> The above occurred on June 8, when you were informed that you would not be working that day and was asked to leave. You refused until the police accompanied you out. While waiting for the police, you verbally assaulted me, used profanity and ignored request not to do so. You engaged in a physical altercation when your attempts to go into offices were blocked.

According to Trucks, although she had told Belongia on June 7 not to come back, and that she refused to allow him to sign in on June 8, she had no intention of firing Belongia at that time. Trucks claims that she could not tolerate his walking out the night before, but that she needed Belongia's skills and training in the weatherization department. Therefore, Trucks asserts that she intended only to suspend Belongia, with pay for some unspecified period of time. Trucks admits that she did not at any time during their confrontation of June 8 tell Belongia that she had intended only to suspend him with pay, although he continually asked her if he was fired. Trucks asserts further that his termination had nothing to do with any union activities engaged in by Belongia.

b. Analysis

An extremely strong prima facie case has been established that Belongia's discharge was motivated by protected conduct. Thus, as detailed above, Belongia was a well-known union supporter who testified at the hearing, was subject to several unlawful threats, and had his office moved in violation of the Act. Moreover, Belongia was also interrogated and threatened in connection with the petition, during which Respondent unlawfully suggested that he quit, which was followed up by a letter which stated inaccurately that Belongia had in fact agreed to quit after 30 days. It is also significant that Belongia during this unlawful interrogation made several positive statements about the petition, including his intended to sign it.

Belongia was discharged within a week of this unlawful conduct by Respondent, and a little more than a month after the unlawful discharge of Smith, and the unlawful removal of the office of both Smith and Belongia to the basement. Therefore, the above evidence overwhelmingly demonstrates that a motivating factor in Respondent's decision to terminate Belongia was his protected conduct. I conclude that Respondent has fallen short of meeting its *Wright Line* burden of establishing that it would have taken the same action against him, absent such protected conduct.

In that connection, I find Trucks' testimony that she did not intend to discharge Belongia until he engaged in several acts of alleged misconduct on June 8 to be contrived and unconvincing. Thus, she told him on June 7 not to come back if he left the premises, contrary to Trucks' wishes, and on June 8 when he attempted to report for work, she would not allow him to sign in and insisted that he leave. While Trucks refused to tell Belongia whether or not he was fired, although he asked several times for his status to be clarified, it is significant that she never told him that he was merely suspended with pay, as she asserts was her intention. I find that her admitted failure to so inform Belongia of this alleged intention of hers severely detracts from her credibility as to this issue.

Although Trucks did not inform Belongia that he was terminated until after the police arrived, it is well settled that the test for determining whether an employer's statements or conduct constitute a discharge, does not depend on the use of formal words of firing, discharge, or termination, but whether the employer's conduct would reasonably lead employees to believe that they had been discharged. *Romar Refuse Removal,* 314 NLRB 658, 670 (1994); *Statewide Transportation*, 297 NLRB 472, 479 (1989); *Ridgeway Transportation Co*., 243 NLRB 1048, 1049 (1979); and *NLRB v. Hilton Mobile Homes*, 387 F.2d 7, 9 (8th Cir. 1967). Moreover, once an employer creates an ambiguity or confusion as to an employee's employment status, it is incumbent on the employer to clarify and remove any implication that the employee has been terminated. *Tubari Ltd.*, 287 NLRB 1273, 1285 (1988); and *Pennypower Shopping News, Inc*., 253 NLRB 85 (1980).

Applying these principles to the instant facts, I conclude that Trucks' comments to Belongia on June 7 that if he left, he should not come back, coupled with her refusal to allow him to work on June 8 while telling him to leave, are more than sufficient to lead a prudent person to believe that his tenure had been terminated. *Romar,* supra (statement to employee "get out of here, . . . we don't need you anymore" plus refusal to assign work that day); *Shenandoah Coal Co*., 305 NLRB 1071, 1073 (1993) (statement to employee, "I think it's time for you to leave." Even though employee then asked if he was fired and supervisor replied no, discharge nonetheless fired since supervisor repeated statement that employee should leave and refused to allow him to work); *Ridgeway*, supra (order to employees to leave the premises unless they were going to work held sufficient to constitute discharge). *Tubari*, supra (statement to employee "go home" sufficient to establish discharge).

Moreover, even if Respondent's conduct can be considered ambiguous, it was obligated to clarify or correct any impression that Belongia was discharged. Clearly, Belongia believed that he had been discharged as evidenced by his consistent requests for something in writing, and a specific clarification of his status, as well as his request to retrieve his personal belongings. *Ridgeway*, supra. Not only did Trucks on behalf of Respondent not avail itself of the opportunity given it by Belongia to clarify his status, but she further demonstrated Respondent's intent to terminate him by continuously ordering him to leave, without answering his question as to whether he was fired. Indeed it would have been simple for Trucks to inform Belongia that he was merely suspended with pay, as Trucks testified was her intention. Such a comment would undoubtedly correct any impression that he was terminated, and might well have resulted in Belongia's leaving immediately. Yet, Trucks did so inform him and did not clarify his status, which further reinforced Belongia's reasonable impression that he was terminated. *Tubari,* supra; *Pennypower*, supra.

Accordingly, since I conclude that Belongia was terminated by the start of his discussion with Trucks on June 8, Respondent cannot rely on any alleged misconduct by Belongia during their meeting to justify its decision to discharge him. In any event, I also conclude that any alleged misconduct, particularly his refusal to leave, his use of profanity, and the "physical confrontation"[32] with Trucs, was provoked by Respondent, and cannot provide a defense to Respondent's unlawful conduct. *Romar,* supra at 671; and *299 Lincoln Street,* supra at 203. See also *M & B Hardware Co.,* 349 F.2d 170, 174 (4th Cir. 1965) ("an employer cannot provoke an employee to the point where the employee commits . . . an indiscretion . . . and then rely on this to terminate (the) employment").

Therefore, based on the foregoing I conclude that Respondent has not established that it would have discharged Belongia, absent his protected conduct,[33] and that it has thereby violated Section 8(a)(1), (3), and (4) of the Act.

10. The alleged discrimination against Ann Walters

a. The facts

As noted above, Walters was the first employee whom Respondent questioned about the petition on May 31. During the questioning, Walters admitted that she had seen the petition and that she had not reported this fact to any supervisor.

On June 9, Respondent issued a letter to Walters, signed by Trucks, placing her on probation, effective immediately. The

[32] I note that it was Trucks who grabbed Belongia's arms when he attempted to retrieve his personal belongings.

[33] I would also note that Respondent's discharge accused Belongia of actions detrimental to FiveCAP including breach of staff confidence, and public repudiation of FiveCAP program. Trucks furnished no testimony explaining what she was referring to with these comments, but it appears to refer the Belongia's actions with regard to the petition, which as I have concluded above was protected conduct. Thus, this is another reason to conclude that Respondent has not met its *Wright Line* burden.

reasons given in the letter for this action by Respondent were Walters' conduct with regard to the petition, plus Walters' failure to sign out properly, or to request time off on May 30.

With respect to the petition, the letter reflects that Walters had admitted seeing the petition, and indicated that "there seems to be reason to question the truth of what you knew and when about the petition." The letter goes on to say Walters' "failure to read and direct your staff appropriately in regard to the petition constitutes poor performance and an indication of unwillingness to accept the responsibilities of your position."

The letter also mentioned that Walters had not requested time off or report that she left the office or correctly document her time. The letter placed Walters on probation, pending investigation, and asked for a response in writing. As requested, Walters responded by letter of June 14. Walters explained that she had left the office on May 30 to donate blood, but it had taken longer than expected. She also stated that she only took 15 minutes for lunch and had reported this to Trucks secretary. As to the May 31 interrogation, Walters maintained that she had given the facts to the best of her ability, and regretted that Respondent had questioned her honesty and ability to accept responsibility.

On June 27, the Union notified Respondent by letter that Walters had become a member of the Union's bargaining committee. On July 18, Respondent issued a letter, signed by Lisa Stankowski, Walters' immediate supervisor, which extended her probation for an indefinite period. The letter referred to the previous June 9 letter, and referred to the reasons for continuing her probation.

The letter mentioned dishonesty as one reason, making specific reference to her failure to report her time properly. The other reason was entitled, "poor job performance," and this referred to Walters' "failure to supervise and properly direct the Assistant in the matter of the negative Petition and by so failing to perform duty committed action detrimental to Agency."

Trucks admitted in her testimony that one of the reasons that Walters was placed on probation was the fact that she had known about the petition and had not reported it to her supervisor.

Respondent also submitted into evidence a number of documents from January 21, 1993, through May 1, 1995, detailing various prior written reprimands against Walters for a number of problems, including several based on her failure to call in to request time off and or leaving the office unattended.

b. Analysis

In view of my conclusions detailed above, that the petition related to protected concerted activity of Respondent's employees, Respondent's actions of placing Walters on probation on June 9, and extending it on July 18, must be found unlawful.

Thus, the letters of Respondent announcing these disciplinary actions makes specific reference to, and Respondent concedes, that Walters' failure to report the petition to Respondent and failure to ensure that other employees under her supervision did the same, was one of the reasons for the probation. Therefore, the evidence establishes that a motivating factor in Respondent's decision to place and continue Walters on probation was her protected conduct.

Thus, Respondent then has the burden of establishing that it would have taken the same action against Walters, absent her protected conduct. Although Respondent did introduce some evidence that nonprotected conduct was one factor in its decision, i.e., Walters' alleged dishonesty, it adduced no evidence that it would have taken the same action against Walters solely for such reasons. Indeed, as noted Respondent freely concedes that one of the reasons for its actions was Walters' conduct with regard to the petition, which I have found to be protected conduct, and for which Respondent cannot lawfully exact discipline against Walters.

Based on the foregoing, I conclude that Respondent has violated Section 8(a)(1) and (3)[34] of the Act by placing Walters on probation and extending that status.

11. The alleged discrimination against Beverly Schaub

a. Facts

Beverly Schaub was employed by Respondent as an assistant community support worker at its Lake County location, since October 31, 1994. She worked 20 hours a week, assisting Walters (the community support worker at the facility). The majority of her time was spent working on the food buying club operated by the agency, which involves signing people up for the program, taking orders, ordering the food, unloading the trucks, and distributing the food. The trucks would come in to the facility once a month. When not working on this program, Schaub would perform janitorial work as well as spending time on another food distribution program called T-E-F-A-P. Thus, trucks would come in once every 3 months. Schaub would on that day help with unloading the food, dividing it up, and distributing it to clients. She would also perform paperwork and other tasks related to this program during the month that the trucks would arrive. Schaub spent 25–30 percent of her time during the 1 month that this truck arrived working on this program.

Schaub was also a single mother of two children, one with special needs, who lived in Baldwin, which is the same town where Respondent's facility is located. According to Schaub, Respondent was aware that she was a single parent of two children, since she had discussions about her family situation with Trucks.

Schaub was a union supporter during the campaign, but no evidence was adduced that Respondent ever became aware of such support. As noted above, Schaub received a copy of the petition and showed it to Walters. This activity resulted in Schaub being unlawfully interrogated on May 31, concerning her activities with regard to the petition, as well as being unlawfully threatened with discharge for her failure to report such petition to Respondent.

On June 26, Trucks came to the Lake County office and along with Stankowski gave Schaub a copy of another petition, which they characterized to Schaub as the "Truth Petition."[35] Trucks and Stankowski, asked Schaub to sign and obtain signatures on this petition from everyone who entered the facility, including clients who came to pick up food. Schaub replied that she would think about it. However, she never singed it, nor asked anyone else to sign it, because she felt that in her opinion

[34] While the General Counsel alleges that Walters' specific union activity, i.e., her being named as a member of the bargaining committee, also played a role in Respondent's decision, I need not and do not make such a finding, particularly since I have found that Respondent's conduct violated Sec. 8(a)(1) of the Act, because Trucks mistakenly believed that the Union was involved with the petition.

[35] The petition states that the signers support the board of directors and management of Respondent, and "deplore the conduct and actions of the few who are trying to tear down thirty years of service and trust."

if she could not become involved with one petition, she would become involved with another one. She did not express these sentiments though to anyone from management. Also no supervisor of Respondent ever thereafter asked her whether she had signed it or whether she had obtained any other signatures.

Walters was on vacation at the time that the second petition was distributed, but Schaub gave a copy of it to her when she returned to work in July and told her what Trucks and Stankowski had said about it. On July 6, Trucks telephoned Walters, mentioned the petition to her, and instructed Walters to garner signatures on it. Trucks also told Walters that the amount of signatures that Walters was able to obtain would give Trucks an indication of whether or not Walters was performing her job adequately. Walters replied that she understood that her job depended on whether or not she obtained any signatures. The record does not reflect whether or not Walters signed the petition, or whether she obtained any signatures.

On or about July 28, Schaub received a letter from Respondent, signed by Stankowski indicating that Schaub's position was being eliminated in Lake County as of July 31, and offered her instead the same position at Respondent's Newago County facility, which was vacant. The letter explained the reasons for Respondent's decision was that "a review of activity in the Lake County office shows that services are down primarily due to the termination of "TEFAP." Thus, the letter continues that "anticipating the loss of SSA funds and the larger number of services provided in New[]go" Respondent decided to eliminate Schaub's position in Lake County.

When Schaub received the letter, she called Stankowski and explained that she would not accept the position in Newago County, since the facility there in White Cloud is 30–35 miles from her home. Thus, since she was only making $5 an hour, her salary would be paying for her babysitter and gas, and she would be working for nothing. Stankowski responded that she understood and would check to see if there were any other job openings for Schaub. Sometime in August, Stankowski contacted Schaub and informed her that there were no other job openings at Respondent that she was qualified to perform.

Mary Trucks testified concerning Respondent's actions with respect to Schaub's position. According to Trucks, the number of slots allotted to Respondent for the CSFP program, which is the food service program that paid for all assistant community workers employed by Respondent, had been reduced from the funding source from 1920 to 1770 slots. Additionally, there had been a misunderstanding between Respondent and the funding source as to how Respondent would be reimbursed.

These problems resulted, according to Trucks, in a decision by Respondent to revise its initial estimate of the number of assistant community support workers that it needed. Originally, Respondent intended to hire one such employee for each county. However, Respondent only hired three before these financial problems began to arise, and never hired such an employee for Mason County. It had hired Schaub in the Lake County facility in Baldwin, Marietta Smith at the Newago County facility in White Cloud, and Sterina Crawford at Respondent's facility in Manistee.

Therefore, Trucks asserts that after discussing the financial problems caused by the above reduction in slots and the misunderstanding concerning reimbursement, with Pomeroy, she concluded that Respondent could only afford to retain one assistant community worker. At that point after reviewing records of usage and discussing the matter with Stankowski, Trucks decided that the one facility that would employ such an employee would be Newago County. At that facility, there were many more clients being served, and Respondent had terminated Smith the incumbent in that position as of June 30 for poor performance. Respondent also eliminated the position of Crawford at Manistee at the same time that it eliminated Schaub's position at Lake County. Further, Respondent decided to offer Sahaub the opportunity to transfer to the vacant position at White Cloud.

Lori Murphy, Respondent's community support worker at the White Cloud facility in Newago County testified that in June she received a call from Mary Jo Klomp, Stankowski's predecessor, as program coordinator. Klomp asked Murphy whether she would like to leave Schaub as an employee to replace Smith, who as noted was fired on June 30. Klomp told Murphy that Respondent was planning to lay off all of the other assistants, but were thinking about offering the position at White Cloud to Schaub. Murphy replied that she had problems with Schaub coming to work with her and that she needed the help.

Subsequently, Murphy testified that after Schaub turned the position down, Respondent advertised to fill the position and received applications. However, according to Murphy, sometime in August Stankowski told her that funding for the position would not last more than the end of September, and therefore Respondent would not be able to fill the position at all.

Respondent also introduced documents from the Department of Education, and its own records, which supported Trucks' testimony that Respondent's slots were reduced from 1920 to 1770, as well as the fact that Newago County served substantially more clients than any of the other counties.

Walters testified that she was informed by Stankowski that Respondent intended to offer Schaub the option to transfer to the White Cloud office, because there were more services being performed in Newago County and there was a greater need for her at that facility. Walters also testified that TEFAP program on which Schaub performed some work was eliminated in May.

Furthermore, Walters asserted that the numbers of orders for food in the food buying program at Lake County, which occupied most of Schaub's had dropped from 102 in 1990–1991 to 45 by July 1995, with most of the reductions beginning in October 1999, when recipients were required to do some work or go to school for 20 hours per week.

Walters also admitted, consistent with the testimony of Trucks that a number of Respondent's employees drove 25–30 miles to get to work. In that connection in fact, Trucks testified, without contradiction, that Smith, Schaub's counterpart at White Cloud, drove even a longer distance that Schaub would have to drive, in order for Smith to come to work.

b. Analysis

I conclude that the General Counsel has established a prima facie case that a motivating factor in Respondent's decision to terminate Schaub was based on her protected conduct. Thus, Schaub on May 31 was unlawfully interrogated by Trucks concerning her activities with respect to the petition, and threatened with discharge for her failure to report the petition to Respondent.

Moreover, in late June, Schaub was given a counter petition by Trucks and Stankowski supporting the current administration, which Schaub never signed or circulated, even though she was instructed by Respondent's officials to do so. It is reason-

able to conclude, which I do that Schaub's equivocal response to the request of Trucks and Stankowski that she "would think about it," did not go over well with Trucks. I note in that connection, Trucks' statement to Walters that Respondent would consider Walters' success in obtaining signatures on this petition as indicative of how Walters was performing her job.

These facts coupled with the previously found discrimination against other employees because of their activities with regard to the petition, plus the timing of the termination,[36] are sufficient in my view to establish that Schaub's protected conduct was a motivating factor in Respondent's decision to terminate her.

However, I am also persuaded that Respondent has adduced sufficiently probative and convincing evidence to establish that it would have taken the same action against Schaub, absent such protected conduct. In this instance, I have found the testimony of Trucks to be credible, particularly in view of the corroboration by the testimony of Murphy, documentary evidence introduced by Respondent, and even to some extent by the admissions of Walters, a witness for the General Counsel. Thus, this evidence establishes to my satisfaction that Respondent did in fact experience financial problems with its reimbursement from the Department of Education for the program that was used to pay the salary of Schaub as well as other assistant community workers employed by Respondent.

I conclude that these problems would have resulted in Respondent deciding to eliminate two of these positions (as well as not have the faculty assistant which it had previously contemplated), whether or not Schaub engaged in any protected conduct. Moreover, the decision to select Respondent's White Cloud facility, as the one office to retain an assistant is amply supported by the undisputed evidence of a substantially higher workload at that facility.

It is significant that the elimination of Schaub's position accompanied by similar action taken with respect to the Manistee facility, where Schaub's counterpart at that facility was also terminated. I note that if Respondent was so intent on discriminating against Schaub, it need not have offered her the opportunity to transfer to White Cloud.

While the General Counsel argues that Respondent knew or could reasonably have foreseen that Schaub would not accept this offer because of her child care situation and the additional driving distance required, I cannot agree that the evidence supports such a conclusion. While Respondent may have known that Schaub was a single mother of two young children, no evidence was presented that Respondent was aware of what child care arrangements Schaub had made for these children, or whether or not the transfer would result in a substantial hardship for Schaub. Indeed the evidence is undisputed that a number of Respondent's employees drive similar or longer distances from their homes to their work locations, including Smith, the employee whose discharge from White Cloud as an assistant community support worker, created the vacancy that Schaub was asked to fill.

Accordingly, based on the foregoing, I conclude that Respondent has met its burden of showing that it would have taken the same action against Schaub, regardless of her protected conduct, and that its actions in regard to her was not violative of the Act.

[36] Thus, Schaub was terminated in late July, only a month after Schaub was requested to sign and circulate the promanagement petition.

12. The alleged discrimination against David Monton and Arthur Burkel

a. Facts

David Monton began his employment for Respondent as a crew laborer in the weatherization department in September 1992. Subsequently, he was promoted to the position of crew leader. Burkel was hired to fill Monton's position as laborer on November 18, 1994.

Monton and Burkel worked in the weatherization department and performed the actual weatherization work on clients' homes, and spent about 15 percent of their time performing general maintenance and yard work at Respondent's various facilities.

They were under the overall supervision of the Weatherization Director Paula Clark as well as Belongia who was the preinspector-field supervisor. Dale Smith was also employed in the department as both a pre and postinspector of the homes that Respondent worked on. Respondent in the past had always subcontracted a large portion of its jobs to subcontractors, but had consistently maintained and utilized its own crew of employees to perform work on some of its jobs.

There had been periods of time in the past, when no weatherization director was employed by Respondent, but Respondent continued to utilize its crew to perform work. In fact no evidence was adduced that Respondent had ever laid off any employees in the weatherization department.

Both Monton and Burkel signed cards for the Union and attended union meetings, and Monton testified at the representation hearing on behalf of the Union.

As noted above I have concluded that Respondent discriminatorily discharged Smith on May 4 and Belongia on June 8.

Burkel was out of work from March 15 to May 15 due to work-related injury, but he voted in the election on April 28. A few days after he returned to work Burkel testified that Pomeroy asked Burkel if he had voted in the election and how he had voted? Burkel responded that he did not think that he had to tell Pomeroy how he voted. Pomerory allegedly added that he knew how Burkel had voted, because only two people voted no and he knew who they were.

Pomeroy denied that he either asked Burkel how he voted or that he told Burkel that he knew how Burkel and everyone else had voted.

In mid-July, Monton went out on sick leave due to an injury that he suffered at home. After Monton left, Burkel worked by himself to finish up a job that he and Monton were working prior to Monton's injury. On one of these days, Pomeroy came to the job with a ladder and assisted Burkel in completing the work. For 3 or 4 days Burkel rode around with Ron Knoblack, who was a subcontractor hired by Respondent to perform inspection work.[37]

On August 3, Pomeroy handed Burkel a letter advising that Burkel would be laid off due to "lack of work." The letter explained that the recent loss of Monton due to his injury would

[37] Between the time that Belongia was fired and Monton suffered his injury, he also rode around with Knobrock seven or eight times, as well as other subcontractors who were hired to pre and postinspect homes. Primarily, Monton would assist the contractors in inspections and show them where the homes were located.

mean that Burkel would be working alone, which for safety reasons would not be acceptable. Additionally, the letter indicates that since Respondent did not know when Monton will return to work the lay offwill extend until further notice.

On August 16, Monton was released by his doctor to return to work. He informed Pomeroy of this fact and turned in a doctors note to Respondent. Pomeroy told Monton to report to work the next day, August 17. Monton asked Pomeroy if Burkel was going to be recalled. Pomeroy replied that Respondent would recall Burkel as soon as jobs were preinspected. Pomeroy also informed Monton that a new weatherization director was going to be coming in and that Monton would show the new director around, familiarize him with the files and show him how the place ran.

On August 17, as Monton pulled into the parking lot to work, Pomeroy informed Monton that he (Pomeroy) had spoken with Trucks the prior evening, and decided it would be best that Monton not return to work until the new director was "up on his feet" and have the position under control. Pomeroy told Monton that he was a good worker, Respondent wanted to keep him, and estimated that he would be recalled in about a week.

However, neither Monton nor Burkel were recalled during this period of time. Monton testified that he had several other conversations with Pomeroy over the next few days about when he was going to be recalled. According to Monton, Pomeroy told Monton that he was in the process of trying to recall Monton to one of the vacant inspector's positions.[38] Pomeroy denied ever telling Monton that he was going to or attempting to recall Monton as an inspector.

Around Labor Day, Monton ran into Pomeroy at the Post Office in Scottville. Monton asked Pomeroy when he was going to be recalled? According to Monton, Pomeroy, replied, "[I]f you could find a better job than Five-Cap you should take it." Pomeroy also mentioned, according to Monton, something about the Union, the petition, and all the picketing that was happening, and stated that it was all going to blow over.

Pomeroy recalled the conversation, but denied that he mentioned anything about the picketing, the Union, or the petition. Pomeroy asserts that in response to Monton's inquiry about his recall, he replied that Respondent was still in the process of getting a new weatherization director and when the director gets acclimated to and understands the program, most likely Monton would be recalled. According to Pomeroy, Monton then replied, "[T]hey better not wait around, because if I find another job, I'm going to take it." It was to this comment of Monton, that Pomeroy claims that he responded that if he found a better job, he should take it.

Monton and Burkel testified that they were never recalled by Respondent, and received no letters from Respondent offering to recall them.

Pomeroy testified on behalf of Respondent concerning its reasons for laying off Monton and Burkel, and refusing to hire Monton as an inspector. According to Pomeroy, Respondent laid off Monton and Burkel in August because Respondent had no one to supervise them, inasmuch as it had terminated Smith and Belongia and had not replaced them, and it also not replaced Clark, as the weatherization director, who had quit. Pomeroy admitted, however, that he had initially told Monton on August 16 to report to work on August 17, because Respondent had made a tentative decision to hire James Mason as weatherization director, and he (Pomeroy) initially felt that Respondent would have to recall both Burkel and Monton, and Pomeroy would assist the new director in supervising the crew. However, according to Pomeroy during a subsequent discussion with Trucks, he had a change of heart, and told Trucks that he didn't believe that he had the time to help supervise the crew and recommended that the men not be recalled until the new director gets hired and acclimated to the program.

Pomeroy further testified, confirmed by documents, that Respondent hired Mason as director starting on August 24 but that Mason resigned on September 5. Subsequently, Respondent continued to advertise for a director and inspector, and hired Chad Van Atter as director on September 28, and Chris Copenhaven as an inspector on October 9.

Despite its hiring of Van Atter and Copenhaven, Respondent still did not recall Burkel or Monton, because according to Pomeroy, they had to receive state certification before they could either pre or postinspect files. Pomeroy further asserts that it was not until after December 20 when Van Atter or Copenhaven were certified to inspect jobs, that work became available for Burkel and Monton to perform.

Pomeroy adds that he and Trucks decided not to call back Monton and Burkel until Van Atter and Copenhaven were certified and performed preinspections. In late December, Respondent still did not call the employees back, Pomeroy testified, because it needed time to get jobs inspected and ready to go, and because it wanted to make sure it didn't lose the contractors that were performing the work.

In that connection, it is undisputed that Respondent had always used outside contractors to perform a majority of the weatherization work on the various homes that it serviced. Subsequent, to the termination of Belongia and Smith, Respondent utilized outside contractors to perform both the inspection work as well as the work at the homes, normally performed by the crew. Pomeroy also testified that another reason for not calling back Burkel and Monton earlier, was that Respondent wanted to make sure it would not lose the contractors who were performing the work, fearing that if Respondent took away some of the work and assigned it to Monton and Burkel, the contractors might leave.

Pomeroy also testified that sometime in early January 1996, Van Atter (the director), contracted mononucleosis and was out of work from that time through the instant hearing, which closed on February 8, 1996. Pomeroy contends that in late January, Respondent decided that it would now call back Burkel and Monton, since Copenhaven was now employed and certified as an inspector, and Pomeroy would fill in as director until Van Atter returns from sick leave.

Thus, according to Pomeroy, Respondent sent letters to Burkel and Monton dated January 26, 1996, stating that "due to having trained and certified Weatherization Director and Inspectors on Staff, this letter is to inform you of your call backs." They were requested to report to work on February 5, 1996.[39]

Pomeroy did not furnish any testimony as to what kind of work Van Atter and Copenhaven were performing for Respondent between their hiring in September or October and their

[38] Monton had previously filed an application for the position of inspector.

[39] As noted above, as of the dates of their testimony, January 31, 1996, Burkel and Monton testified that they had not received those letters.

certification to perform inspection work on December 20, other than to assert that they did not and could not perform inspections for Respondent prior to their certification.

However, Respondent's records appear to contradict Pomeroy's testimony in this regard. Thus, these records indicate that in October 1995, Van Atter postinspected one job, in November, he postinspected six jobs, and preinspected four, and in December he post inspected six. Copenhaven, according to these records, preinspected four jobs in November, and five in December, while postinspecting six and three months respectively in these months.

In January 1996, Copenhaven preinspected 18 jobs and postinspected 10, while Van Atter preinspected two jobs. All of the work at these jobs was performed by contractors. Additionally, the pre and postinspection of these jobs not performed by Van Atter or Copenhaven was also performed by outside contractor Ron Knoblock. In that connection, Knoblock performed one preinspection in October, five in November, and four in December. He performed one postinspection in November 1995, and eight in January 1996.

Pomeroy also conceded that had Smith and Belongia not been terminated, Burkel and Monton would not have been laid off.

With respect to Respondent's failure to offer Monton one of the admittedly vacant inspector positions, Pomeroy testified that that sometime in May he asked Belongia whether Monton would make a good inspector. According to Pomeroy, Belongia told Pomeroy that he did not believe Monton would make a good inspector because of Monton's poor writing skills, including particularly his poor handwriting, and his inability to spell. In that connection, Respondent submitted an evaluation of Monton, prepared and submitted by Belongia, dated July 12, 1994.

This document which reflects Monton's promotion from crew laborer to crew leader reflects that the promotion was temporary and probationary, and was dependent on Monton's ability to improve in a number of areas, including "better writing skills."

Pomeroy testified further that he reported his conversation with Belongia with regard to Monton's ability to be an inspector to Trucks, and they decided not to offer the position to Monton.

Pomeroy admits, however, that he never spoke to Monton about his handwriting skills, and that Monton was never demoted, although Belongia's memo indicated that Monton would be demoted back to laborer, unless he improved in various areas, including handwriting skills. It is also noted that Pomeroy never informed Monton that he was not being selected for the position because of such problems, although Pomeroy concedes that he discussed the subject of the inspector's job with Monton.

More significantly, in his pretrial affidavit given to the Board, Pomeroy made no mention of Monton's poor writing skills as a reason for Respondent's failure to select Monton as an inspector. Finally, in what the General Counsel characterizes as a position paper submitted by Respondent's attorney, Respondent suggests[40] that at least one of the reasons why Monton was not given the position of inspector was because he had not passed the state certification exam. However, Pomeroy admitted at the hearing that Monton's lack of certification had no bearing on the decision not to offer him the inspector's job.

b. Credibility resolutions and analysis

To the extent that Pomeroy's testimony differed from that of Monton and Burkel in several significant respects, I credit the accounts given by Monton and Burkel. In addition to comparative demeanor considerations, I rely upon the fact that the statements attributed to Pomeroy by the employees were similar to statements which I have already found were made by Trucks to employees, and the fact that Pomeroy's testimony was contradicted in fact by his pretrial affidavit, as well as by Respondent's own records. (His testimony that Copenhaven and Van Atter performed no inspection work for Respondent until after Respondent was notified of their certification, on or about December 20.)

Having so found, I therefore conclude that when Pomeroy asked Burkel if and how he voted in the election,[41] Respondent coercively interrogated Burkel in violation of Section 8(a)(1) of the Act. *Taylor Chair Co*., 292 NLRB 658 fn. 2 (1989). Moreover, when Pomeroy told Burkel that he knew Burkel had voted, I conclude that Respondent unlawfully created the impression of surveillance of employees' union activities, in further violation of Section 8(a)(1) of the Act. *Capitol EMI Music, Inc*., 311 NLRB 997, 1006 (1993).

Furthermore, I have found also that in September, in response to an inquiry from Monton as to when he would be recalled, Pomeroy told him that if he found another job he should take it, and mentioned the picketing, the petition, and the Union, and that he (Pomeroy) expected that it would blow over. I conclude that these remarks of Pomeroy constitute an implied threat that he had not been recalled previously and would not be recalled in the future, because of protected conduct (i.e., the union activity at Respondent at that time, including the picketing and the petition, calling for the removal of Trucks and Pomeroy) and in violation of Section 8(a)(1) of the Act. Cf. *Stoody Co*., 312 NLRB 1175, 1181 (1993).

With respect to Respondent's decision to lay off Burkel and Monton in August, once again a strong prima facie showing has been made that protected conduct were motivating factors in such action by Respondent as to both employees.

Thus, both Burkel and Monton were subject to direct unlawful 8(a)(1) statements by Respondent's officials, were both known union supporters,[42] and Monton also testified at the representation hearing on behalf of the Union. Further, when Monton inquired about recall Pomeroy suggested that he find and take another job, and while mentioning the picketing, the

[40] Respondent asserts that the document submitted by the General Counsel is not a position paper, and was merely a response to the General Counsel's request for documents. I conclude based on my reading of the letter, that however it is characterized, the statement made therein that Respondent was submitting a document establishing that to the extent that Monton or Burkel expressed an interest in or applied for the position as an inspector, neither is properly certified, clearly suggests that at least one reason for Respondent's decision not to offer the postion to Monton was due to his lack of certiication.

[41] I find that Pomeroy made such inqueries of Burkel, I also rely on my behalf that it would be logical for Pomeroy to have asked such questions of Burkel, since Burkel was out on sick leave on the day of the election.

[42] I note in this connection that when Burkel was unlawfully interrogated by Pomeroy, he refused to answer Pomeroy's inquiry, suggesting that he had something to hide (i.e., he was a union supporter) and Pomeroy told Burkel that he knew he had voted for the Union.

petition, and the Union, stated that he expected that it would blow over. These remarks of Pomeroy are a significant indication that the petition, picketing, and the Union were a cause of Respondent's decision to lay Monton (and Burkel) off and that when these activities "blow over," Monton might be recalled by Respondent.

The foregoing facts, coupled with the previously found violations of the Act, establish compelling evidence that protected conduct was a motivating factor in Respondent's decision to lay off Burkel and Monton.

I conclude that Respondent has fallen far short of meeting its *Wright Line* burden that it would have laid off these employees, regardless of such protected conduct.

In this regard, Respondent relies on the testimony of Pomeroy, which I found to be unconvincing, contradictory, and which does not withstand scrutiny. Thus, the letter given to Burkel, announcing layoffs asserts that it was due to "lack of work." That statement is clearly incorrect, since it is undisputed that there was plenty of work to be performed by the crew during the entire period of the layoff, but that Respondent chose to assign it to subcontractors.

The letter further explained consistent with Pomeroy's testimony that there would be no one to supervise Burkel, since Monton was out on sick leave. The letter also makes clear that when Monton returns to work, Burkel would be recalled. However, when Monton recovered from his injury, and sought to return to work on August 17, Respondent inexplicably refused to permit him to return, and therefore did not recall Burkel as well. I find Pomeroy's testimony with regard to this decision to be particularly unconvincing. Thus, when Monton gave Pomeroy a doctor's note on August 16 attesting to his ability to return, Pomeroy unhesitatingly informed him to report the next day, indicated that Burkel would also be recalled shortly, and told Monton that he would show around the new director that Respondent would be hiring.

Notwithstanding this unequivocal action by Pomeroy with regard to recalling Monton, Pomeroy asserts that he, after thinking it over, had a sudden change of heart and decided that he no longer had the time to devote to supervising the weatherization department, and opted to recommend to Trucks that Respondent not recall the employees until the new director gets hired and acclimated to the program. I find Pomeroy's testimony in this respect not to be credible. Rather, I believe that he was simply overruled by Trucks in his decision to recall the men, and that Trucks' decision to overrule Pomeroy was motivated by protected conduct of employees.

I note in this connection the intense animus that Trucks has demonstrated not only towards employees because of their union activities in general, but additionally due to their activities with regard to the petition, which as I have found above, Trucks attributed to the Union's desire to get her fired. It is significant that during this period of time, there was still picketing being conducted, newspaper articles were appearing publishing the dispute, and the Union had already filed eight charges against Respondent, resulting in two complaints being issued by the Region, alleging unlawful conduct by Respondent. Therefore, I conclude that it was Trucks' annoyance with these events that motivated her to overrule Pomeroy and to refuse to recall Burkel and lay off Monton.

Indeed Respondent had always employed a weatherization crew in the past, had assigned them maintenance in prior years when work was slow, and never laid any crew member off before. Furthermore, although Mason, the new director hired by Respondent, lasted only a few days, Respondent hired a new director on September 28 and an inspector on October 9. Yet, notwithstanding Pomeroy's testimony that Burkel and Monton were not recalled because there was no one to supervise them, Respondent still did not recall the employees although it admittedly had hired Van Atter and Copenhaven, until January 26.

Pomeroy's attempt to explain this action is even more unbelievable that his prior attempts to justify Respondent's personnel decisions. Pomeroy claimed that Respondent did not recall Burkel and Monton during this period of time, because Van Atter and Copenhaven could not inspect jobs until they were certified by the State, and therefore there would be no jobs inspected for the crew to work on. This contention does not withstand scrutiny for two reasons. First of all, Respondent was using outside contractors to inspect jobs during this entire record, so clearly the crew could have performed work on these homes. Pomeroy noting the inconsistency of this problem, added another reason for Respondent's action, that it was afraid it would lose its contractors if it assigned work to the crew. I find this explanation unpersuasive. Respondent had always assigned work in the past, both to contractors and to the crew, and Pomeroy did cite a single instance where Respondent had "lost" a contractor because it assigned work to its crew.

More significantly, as I have noted above, Respondent's own records contradict Pomeroy's testimony that Copenhaven and Van Atter did not perform any inspections for Respondent until they became certified in late December. Thus, these records show eight jobs were preinspected by these two in November, and five in December, thus, demonstrating that there were jobs that could have been worked on by Burkel and Monton, contrary to Pomeroy's testimony. Moreover the records also show that Van Atter and Copenhaven postinspected 13 jobs from October through December, which further undermines Pomeroy's credibility.

Further, it was not until January 26, 1996, that Respondent finally sent letters recalling Burkel and Monton. Even then Pomeroy's testimony is suspect. Thus, in an attempt to justify not calling the men back earlier, Pomeroy pointed to the fact that Van Atter contracted mononucleosis in early January 1996. However, Van Atter was still out of work as of January 26, when Respondent sent the letters of recall, which demonstrates that Van Atter's illness had no affect on Respondent's decision as to when to recall the employees. Rather, I conclude that Respondent decided to send the letters 3 days before the instant hearing was opened, in an attempt to lend some credence to its purported defense that lack of supervision was responsible for the layoff.

Accordingly, based on the foregoing I conclude that Respondent has not met its burden of establishing that it would have taken the action against Monton and Burkel absent their protected conduct.

Furthermore, the record reveals but another reason for concluding that Respondent's conduct with regard to Monton and Burkel was violative of the Act. Thus, based on Pomeroy's own testimony, Respondent would not have laid off Monton and Burkel, if Smith and Belongia were still employed by Respondent. Therefore, since I have found, above, that Respondent's actions in discharging Smith and Belongia were discriminatorily motivated, it follows that layoffs of Monton and Burkel, having admittedly been caused by the unlawful discharges of Smith and Belongia, are also unlawful. Thus, the

protected conduct of Smith and Belongia was a motivating factor in the decision to lay off Monton and Burkel. *Bay Corrugated Container, Inc*., 310 NLRB 450, 451 (1993); and *Dawson Carbide Industries*, 273 NLRB 382, 389 (1984), enfd. 782 F.2d 64 (6th Cir. 1986).

Based on the above analysis and authorities, I therefore conclude that Respondent laid off and thereafter refused to recall Burkel and Monton in violation of Section 8(a)(1), (3), and (4) of the Act.

The complaint also alleges, and the General Counsel contends that Respondent further violated the Act by refusing to hire or consider Monton for one of the vacant inspector positions. I find once again a strong facie case has been established that Monton's protected conduct was a motivating factor in Respondent's actions in this regard.

In addition to the above-described evidence which I have considered in finding Monton's layoff unlawfully motivated, I also rely upon the fact that Pomeroy told Monton in late August that he was in the process of trying to recall Monton to one of the vacant inspector positions. I credit Monton's testimony in this regard, over Pomeroy's denial. In addition to my overall assessment of Pomeroy's credibility as discussed above, I also note that Respondent was in great need of an inspector at that time, since it had a lot of work to perform and a depleted staff. Thus, I find it logical that Pomeroy would have attempted to hire Monton for the inspector's position as Monton testified.

However, I find it reasonable to conclude, which I do that once again Pomeroy was overruled by Trucks, who ordered Pomeroy not to offer Monton the inspector's position based on his protected activity. Once more, as in the case of Trucks' rescinding Pomeroy's prior decision to recall Burkel and Monton, I note the pendency of the petition, picketing, and numerous unfair labor practice charges at the time, plus the fact that Trucks viewed the Union as attempting not only to organize her employees, but also to get her fired.

Once more, I conclude that Respondent has fallen short of establishing that it would have taken the same action against Monton, absent his protected conduct. Pomeroy testified in that regard that Respondent's decision based on Belongia's alleged recommendation to him in May that Monton would not make a good inspector due to his poor writing skills (handwriting and spelling). I find this testimony unpersuasive, since whether or not Belongia made such a recommendation to Pomeroy, clearly Pomeroy was prepared to ignore it when he told Monton in late August that he was attempting to get him hired as an inspector.

It is also significant that Pomeroy's pretrial affidavit makes no mention of Monton's poor writing skills as a reason for not offering him the position and that Pomeroy never mentioned this problem to Monton. Moreover, a letter from Respondent's attorney to the Region suggests that Monton was not given the position because he had passed the State Certification test, which was clearly repudiated by Pomeroy's testimony that the lack of certification had nothing to do with Monton not being offered the position.

Accordingly, based on the foregoing, I conclude that Respondent's decision not to hire Monton as an inspector was violative of Section 8(a)(1), (3), and (4) of the Act.

13. The alleged discrimination against Melissa Kukla, Amanda Lange, Karen Sandstedt, and Jane Myers

a. Facts

Melissa Kukla, Amanda Lange, and Karen Sandstedt were employed by Respondent as teachers in its FiveCAP in Manistee. Jane Myers was employed at Respondent's Lake County Center, also in the FiveCAP as a teacher.

The FiveCAP is and has been part of Respondent's Head Start program, which has been utilized by Respondent in one or more counties and one or more forms since late 1970.

Both Head and FiveCAP provide preschool education to eligible recipients. The FiveCAP primarily involved teachers visiting the homes of the students where they teach the pupils, as well as meet with their parents or other guardians.

Kukla, Lange, and Sandstedt in performing these functions, met with students and parents several times a week in their homes. Myers, in addition to visiting parents and students in their homes for 3 days a week, taught students in a classroom twice a week at Respondent's facility in Lake County.

Kukla was hired by Respondent in 1990, and had worked in various positions such as teacher's aide, busdriver, head and classroom teacher, and home visit teacher. Lange was hired as a teacher's aide at Respondent's Summit facility in the Head Start program, in January 1994, and in September 1994 accepted as position as home visit teacher at Manistee. Sandstedt was hired in August 1994 as a home visit teacher in the FiveCAP at Manistee. Myers was employed by Respondent since September 1989 at the Lake County Center, for 3 years as teacher's aide and for 2 as home start teacher. Al four teachers had received very good evaluations from Respondent's officials, and all of them had obtained their CDA, a specialized college degree in preschool education while working for Respondent at its expense.

Prior to Kukla being hired by Respondent as a teacher in 1990, she was interviewed by June Newkirk, Respondent's director of Mason County Head Start, and was offered a position as Tastee Meals driver, which Kukla declined. A month or two latter, without having filed another application, Kukla was called by Carol Brown, another supervisor of Respondent, reinterviewed and hired as a teacher. Also in August 1993, after the program that Kukla was working with at the Luddington Center was canceled, Mary Trucks offered Kukla a choice of three different positions, at three different facilities, including a head teacher job, without Kukla having to fill out an additional application for any of these jobs.

Additionally, while Kukla was serving as a head teacher at Respondent's in the 1993–1994 school year, at the Fountain facility, Newkirk discussed with Kukla the hiring of a teacher's aide, who had not previously filled out an application for employment.

Further, when Sandstedt was first hired by Respondent, she submitted an application for a teacher's position several months prior to August 1994. At that time, she interviewed with Trucks for a teacher's position. She was not offered a job at that time, because Trucks would not allow her to take time off to go on a trip to Paris, as she requested, before starting the job.

In July, without having submitted another application she was called by Patty Murphy and asked to come in for an interview. She was interviewed by Newkirk, Murphy, and another representative of Respondent, and was asked to and did fill out another application dated July 25, 1994. She was offered and

accepted a position as a home start teacher. She was told during that interview or the previous one with Trucks, that Respondent's practice was to keep applications and resumes on file for a year.

Kukla, Lange, Sandstedt, and Myers were all outspoken advocates and supporters of the Union who attending union meetings and encouraged other employees to support the Union. Kukla, Lange, and Sandstedt spoke in favor of the Union at work in the presence of Sandra Rotzein, an admitted supervisor of Respondent. Rotzein also attended one union meeting in January along with Kukla, Lange, and Sandstedt. Kukla and Lange were both subpoened by the Union to testify at the representation hearing. Kukla testified at the hearing, while Land did not. However, Lange did attend all 3 days of the hearing and openly assisted the Union's counsel by passing notes to him and whispering suggestions to the union business agent.

On June 21 the Union notified Respondent that the Union's bargaining committee will consist of seven individuals, including Jane Myers. During the course of the union campaign, Respondent hired a David Parmentier as a consultant, who instructed Respondent's supervisors in what they can and cannot say to employees, and how to dissuade employees from supporting the Union. During the course of and of these meetings, in the presence of White, Parmentier asked a number of Respondent's supervisors how the employees under their supervisors felt about the Union. When it came to the Lake County facility, head teacher and supervisor of the FiveCAP Diane Smolinski furnished her opinions as to the union views of employees at that facility. When it came to Jane Myers, Smolinski told Parmentier that she didn't know Myers' opinion of the Union, but added that Myers had referred to the fact that her husband was a member of the Teamster's Union.[43] Parmentier replied, "[O]h, her husband's a teamster," and made a notation to Myers' name on a sheet of paper.

Additionally, as noted above, I have found that Respondent violated Section 8(a)(1) when Rotzein told Lange that employees had better watch out who they tell that they are in support of the Union, because if it gets back to the office, "there might be trouble." I have also found above that when Lange informed Trucks that she had been subpoened to testify by the Union at the representation hearing, Trucks replied that Lange must have signed a card and was a supporter of the Union if she was being subpoenaed by the Union. While the General Counsel does not allege, and I have not found that this remark of Trucks was violative of the Act, I do conclude that it is indicative of Trucks' animus towards the union activities of Respondent's employees, as well as further evidence that Trucks believed that Lange was a supporter of the Union.

Respondent's normal practice was to temporarily lay off its teachers at the end of the school year in May, and recall them in August when the new school year begins. However, although Kukla, Lange, Sandstedt, and Myers were laid off in May 1995 as per normal, they did not receive a letter of recall in August 1995. Moreover, although other employees were recalled, Respondent failed to notify any of these employees that their positions had been eliminated or that they were not going to be recalled for the new school year.

When the employees learned in mid-August that other teachers had received call-back letters, they each called Respondent's Scottville office and spoke to White to find out if they were going to be recalled. Melissa Kukla spoke to White on or about August 11. White informed her that her position had been eliminated and that she was not to report to work. Kukla asked White if there were any other positions in the agency that were available or open. White replied that the only open position was a teaching position at Summit in the at risk program that required a ZA endorsement, which position Kukla was not qualified for, and she did not have this endorsement.

At around the same time, Sandstedt also spoke to White. Sandstedt asked about reporting to work. White informed Sandstedt that Respondent had moved the FiveCAP to another center, and that she was not going to be called back. Sandstedt asked if there were any other positions available for teachers or teacher's aide. White replied that Sandstedt could apply for a head teacher's position at either Summit or Lake, or a teacher position in Summit, which required a ZA endorsement, which Sandstedt did not have. White also mentioned that there was a busdriver's position open, but made no mention of any teacher's aide positions.

On or about August 12 or 13 Lange called White on several occasions, but was unable to reach her. Finally, Lange went to the Scottville and spoke to White personally. Lange asked if she was going to be called back? White replied that her position had been terminated. Lange asked about any other positions that she was qualified for? White responded that there were no open positions at her center. Lange inquired about positions in other centers. White answered that Respondent hired employees, "center by center."

Myers spoke to White on or about August 11, as well. Myers told White that she had heard that Respondent was phasing out the FiveCAP at Lake County, and asked if she was being called back? White responded that yes Respondent was trying something new at Lake, and Myers was not one of the employees being called back. Myers then asked to be considered for any position that became available that she was qualified for, especially in Lake County, but not exclusively in Lake County. White responded that Respondent had a head teacher and busdriver position open. Myers, who was not interested in either of these positions, made no reply. During these various conversations with these employees in which she discussed with them the subject of other positions being available for them, White at no time informed any of them that they would be required to fill out a new job application if they were interested in any such position that might become available.

In fact, Respondent subsequently advertised for and filled a number of positions at various facilities without either interviewing or considering any of these four employees for these jobs. In addition to their conversations with White about being considered for other openings, the employees made several other attempts to apply for various positions with Respondent. Indeed, Lange sent a note to Trucks dated June 5, after the summer layoff, but before she even knew that she would not be called back, indicating to Trucks that she enjoyed her job as a classroom teacher, and was interested in any openings that Respondent might have. Lange saw an ad in the paper in mid-August, advertising for a teacher and a head teacher. The application deadline for the ad was August 21.

On August 23 Lange spoke by phone with April Foley. Foley explained to Lange that she (Foley) had just been promoted to head teacher at Summit, and that made Foley's previous position as a teacher available. Foley told Lange that she

[43] In fact Myers' husband has been a member of Local 406, I.B.T. for 20 years.

would like to have Lange working with her in the center, and that she could not understand why Lange had not been offered the position. Foley added that Summit was right in Lange's area and she would love to have her.[44] Accordingly, the very next day, Lange submitted another application to the Scottville office, applying specifically for the teaching position at Summit. Subsequently during the next several weeks, Lange had several conversations with Foley about the position, and Foley informed her that it had still not been filled. That teaching position at Summit was eventually filled on September 11 by an individual named Robin Wright who had never worked for Respondent, had no previous experience as a teacher, and who did not even have a CDA certificate that Lange, as well as all the other three employees had already obtained, at Respondent's expense. Lange also saw a number of other subsequent ads for jobs at Respondent throughout the fall of 1995 and in January 1996. However, Lange did not file any applications for these positions, or make any inquiry of Respondent concerning these jobs.

Sometime in mid-August, Sandstedt heard that there was a position available at Respondent's Fountain Center. She went to the Fountain and spoke with Rotzein about it. Rotzein, who had previously been Sandstedt's supervisor and head teacher at Manistee, had been transferred to Fountain in the same position. Sandstedt asked Rotzein about the availability of the teacher's aide position. Rotzein replied there was a position available and "as a matter of fact, I've called Melba twice and requested you for that aide's position." Rotzein added that White had told Rotzein she needed to talk to Trucks about it and then would get back to Rotzein. Sandstedt immediately went to Respondent's Scottville office, and filled out an application dated August 22 applying for a job as teacher or teacher's aide. Neither Sandstedt nor any of the other three teachers were either interviewed for or were offered this position. It was filled by a Charlotte Helgemo on September 1, who had not previously worked for Respondent, and who had no previous experience as a teacher's aide or in any classroom setting.

Kukla also noticed advertisements in the newspaper for positions at Respondent. Accordingly, on August 18, she submitted a written application to Teresa Lumbard, White's secretary applying for the teacher and teacher's aid positions mentioned in the newspaper. She also was not interviewed for nor received an offer for any subsequent position.

Myers also noticed ads in the paper for positions at Respondent and specifically heard about an opening at Fountain for an aide position. In late August, she called and found out that the position was still vacant. Therefore, she immediately wrote a letter applying for this position. Myers hand delivered the letter personally to Melba White and told White that she was interested in the aide position at Fountain. White accepted the letter and said all right. Myers said thank you and left. White did not tell her whether the position had been filled, or that if she had applied for the position after the application date had expired. Myers was also neither interviewed for nor offered the aide position at Fountain, which as noted above, was given to a new employee, Charlotte Helgemo.

In October, Myers heard about an opening as a teacher's aide at the Lake County facility, as well as seeing an advertisement for this position in the paper. Therefore, she sent a letter to Respondent, dated October 16, requesting to be considered for this position. By letter dated October 19 from White, Myers was informed that the position for which she applied had been filled, and thanked her for her interest. The letter also stated that according to Respondent's personnel policies and procedures, Myers' application will remain on file for 1 year. In late December, Myers heard that Tracy Battle who was a teacher at the Respondent's Lake County facility had resigned. Accordingly, she sent a letter to Respondent requesting consideration for that position which was received by Respondent on January 2, 1996. Myers was neither interviewed for nor offered this position by Respondent.

The record also revealed that Respondent hired several other new employees subsequent to its failing to call back Lange, Sandstedt, Myers, and Kukla. They included Ginger Johnson who was hired as a teacher, teacher's aide at Manistee, Amy Allen hired as a busdriver and Bitely, and then transferred to a position as driver/aide. Marla Nicholson, hired as an aide at Summit and L. Koviak, starting December 28, hired as an aide at Fountain. Once again neither Kukla, Sandstedt, Myers, nor Lange were ever interviewed for any of these positions.

Mary Trucks testified extensively on behalf of Respondent, supported in part by several other witnesses, concerning the issue of Respondent's reasons for eliminating the positions of Kuala, Lane, Sandstedt, and Myers. The grant process for the Head Start program (which includes Home Start) begins with meetings in early April of each year attended by board members, policy council members, staff, and parents. Based on these meetings, Respondent's staff prepares a document, highlighting what changes, if any are being recommended and Trucks presents the entire package to the policy council and the board of directors sometime in July. After this document is approved it is sent to Chicago for final approval by funding source.

According to Trucks, this process was followed as per usual in 1995, resulting in a recommendation approved by the policy council and board in July, which called for a change in program design. This change encompassed the elimination of the FiveCAP in Manistee and Lake Counties, as well as the Mason County mobile unit, and to utilize a "center based" program at all facilities of Respondent, with one exception. The exception was the Bitely Center, where Respondent has a FiveCAP.

Trucks asserts that the reasons for Respondent's decision were that Michigan had changed its Welfare law in 1994 to require recipients to work outside the home in order to receive welfare, and that she was aware that Michigan's governor was proposing an even stricter welfare bill, which would make it even difficult for parents to be at home. Since an essential requirement of the FiveCAP is to have parents in the home and be part of the program, these welfare changes in Respondent's view had already adversely affected enrollment in the program, and would be even more likely to do so in the future. Thus, Trucks claims that she concluded, "[H]ome based was dead" and "center based" was the only way that Respondent could serve and meet the needs of parents.

Trucks also explained why Respondent chose to institute a FiveCAP in Bitely, where that facility had previously operated a center-based program. According to Trucks, Bitely had been turning away students because the facility was too small, and Respondent sought to provide more services to this facility. Trucks further testified that Respondent did not have a large

[44] Foley had previously worked with Lange, when Foley was a teacher and Lange a teacher's aide.

enough facility to expand the center-based program at Bitely, so it decided to try the FiveCAP there for 1 year, with the intent ending the program in a year when a new facility will be available which is large enough to accommodate more students.

Respondent also introduced documents which purported to demonstrate the drop in enrollment at its facilities, which Trucks attributed to the new welfare rules. These documents reflected enrollment figures for Respondent's facilities the months of March, April, and May 1995. During each of these months these records show that the Manistee Home program had an enrollment of 25 in a program which called for 35 slots. The Lake FiveCAP had 17 enrollees for 19 slots in March and April, and 14 in May. Respondent introduced no similar records from prior years.

Trucks' testimony received some support from the testimony of Jan Bailey, chair of the board of directors, who confirmed that the governor's new welfare program which impacted adversely on parent participation in home start was discussed at board meetings as the reason for Respondent's decision to eliminate the program at Manistee and Lake County. Bailey was vague and uncertain in her testimony as to whether there was such discussions prior to the July meeting when the decision was approved. Bailey was certain, however, that the problems involving new welfare rules impacting upon past and future enrollment was discussed at several such meetings.

Trucks's testimony also received corroboration and support from Sandra Rotzein, who had been head teacher at the Manistee Center for 5 years, until she was transferred to the Fountain Center in the same position for the 1995–1996 school year. According to Rotzein, at her facility she notices a significant drop in enrollment for the FiveCAP in 1994–1995, which she attributed to the work requirements of the Work First program. Conversely, Rotzein asserts that Respondent had never had any difficulty in maintaining full enrollment in the center-based programs. She added in this connection that she had conversations with some parents, who told her that the work requirement was impacting on their ability to keep their children in Home Start.

Rotzein also conceded on cross-examination that a number of parents were very happy with the FiveCAP and had expressed to her that they liked the individual attention that their children received, and that they were happy with the home visit teachers themselves.

Rotzein also denied that Respondent maintained a waiting, but admitted that it did maintain a list of potential students for the next year called preenrollment. According to Rotzein, that figure was way down for the 1995–1996 year, and that some parents told her that they had to drop out of the FiveCAP, because they had to work. She could recall, however, the name of only one parent who so informed her. The parent was named Woodcock, and Rotzein believed that the conversation took place in October 1994, when Woodcock pulled her child out of the FiveCAP, and told Rotzein that the parent was going to leave the area in order to get work. Rotzein also testified that she did not recall ever telling Trucks about these conversations with parents detailing problems with working vis-a-vis the home visit program, but did recall the subject coming up during head teachers' meetings with Trucks that she attended.

Rotzein also testified at the end of the 1994–1995 school year preenrollment was way down at the facility. According to Rotzein, however, the pre-enrollment applications do not reflect which program the applicant would be placed in, since that decision is not made until the fall. Thus, according to Rotzein, Respondent considered full enrollment to be 35 for the FiveCAP, and 20 for the center based for a total of 55. Rotzein recalled that at the end of the 1994–1995 school year, the preenrollment applications totalled around 14, which was low as compared to prior years. However, Rotzein conceded that this was a combination for both programs, and was not broken down into home or center-based applicants. Finally, Rotzein also conceded that when a parent was unavailable, the Home Start teachers frequently would make efforts to reschedule the appointments.

Diane Smolinski, a former head teacher of Respondent at the Lake County facility, testified that at her center, the new welfare rules did not cause any enrollment problems, other than to affect the number of volunteers that Respondent was able to obtain. According to Smolinski, while the new welfare rules did cause some parents to be unavailable during the day, the teachers would arrange to make their home visits at different times so as to accommodate the parents availability. This testimony was corroborated by Myers, Lange, and Kukla who each testified that the new welfare rules caused little or no problems with enrollment since the teachers would simply rearrange their schedules to accommodate the parent.

The employees corroborated by Smolinski testified that there were no significant enrollment problems at their facilities, that normally enrollment drops at the end of the year, but picks up again when the new year starts. Further, they assert that enrollment prospects were particularly good for the 1995 school year, because of a number of siblings of current students had expressed an interest in signing up for the program. Moreover, Smolinski testified as did the employees, that both facilities maintained a waiting list, and that they expected close to or full enrollment at the Manistee and Lake County facilities in the FiveCAP.

Furthermore, Smolinski was never given any indication by any official of management that there was any problem with enrollment at her facility or that Respondent intended to eliminate the FiveCAP.

Additionally, all of the four teachers assert, corroborated by Smolinski, that the parents served by the program were very pleased to participate in it and had only expressed praise to them about the program. In this connection, in their pretrial affidavits both White and Trucks stated that parents had complained about the FiveCAP in questionnaires that had been distributed to them by Respondent, and that Respondent relied on these complaints in making its decision to eliminate the program. Indeed according to White's affidavit, Respondent's decision was based on these surveys of what parents would like to see in the program for next year. She further asserted that the surveys demonstrated that teachers were often unable to meet with parents in the homes because parents had to work under Social Service requirements.

However, an examination of these surveys, which were introduced by the General Counsel tend to corroborate the testimony of the employees and Smolinski, vis-a-vis Trucks' testimony and the affidavits of both Trucks and White. Thus, the surveys contained overwhelming positive assessments of the Home Start program by the parents, including praise for the teachers as well as the one-on-one aspect of the program. More importantly, none of the surveys contained any references to any problems that any parents had with being unable to meet with teachers for any reason, much less because of any prob-

lems with Welfare or Social Service rules. Indeed, some surveys specifically referred to the "flexibility" of the program as one of the positive comments about the home visits by the teachers.

As noted above, Trucks testified the decision to eliminate the Mobile Teaching Unit at Mason County, made at the same time as its decision to eliminate the Home Start program, was made for the same reasons, i.e., the enrollment problems caused by the new welfare rules. However, Trucks' testimony in this regard is contradicted by the testimony of White, as well as Respondent's policy personnel committee minutes, dated August 1. These minutes indicate as did White's testimony that the reason that the mobile unit was eliminated for the 1995–1996 program year was "due continuous breakdowns and the finances needed for extended repairs and up keep." Once the new program design was approved, which as noted provided for elimination of the FiveCAP as well as the Mobile Unit, that eliminated a total of seven positions. The positions of Lang, Sandstedt, Myers, and Kukla, as well as that of Sondra McKay who was also Home Start teacher with Myers at Lake County, and two employees who worked on the Mobil Unit program, Lorraine Avery and Lisa Vega were eliminated.

Once that decision was made, Respondent had to decide how to staff its facilities for the school year. Melba White furnished testimony as to this issue, along with charts of each facility, and how and why Respondent allegedly filled any vacancies that it had in each center.

At the Manistee facility, Rotzein who had been head teacher at that facility, transferred to Fountain at the same position. That left an opening in the head teacher's position at Manistee, which was filled by Patty Peabody, who had been a center-based teacher at that center the previous year. According to White, Peabody was selected over Lange, Sandstedt, and Myers because these three employees had never been a head teacher before. While Kukla had previously served as a head teacher, White asserts that Kukla had not indicated to White that she was interested in a head teacher's position. Respondent also notes that Peabody had more seniority than Lange. Peabody began her employment with Respondent on March 7, 1994, as a head teacher in the Head Start Program, while Lange began her employment on September 1, 1994.[45]

That action left an opening in the teacher's position, vacated by Peabody. That job was given to Carol Brown, who last year was the head teacher at Summit. Brown had informed Respondent that she no longer wished to be a head teacher, and requested a teacher's job. Since Brown had been with the agency since 1983, she was given the teacher's position at Manistee, according to White.

Subsequently, Brown was transferred to a head teacher's position at Lake County, when Smolinski resigned. The opening created by Brown's departure was filled by Lorraine Avery on September 21. Avery had previously been employed as the head teacher in the Mobile Unit. White testified that Avery was selected rather than Kukla, Lang, Myers, or Sandstedt for this position because she had more seniority than any of them, and because Respondent had received a timely job application from Avery, which was in response to an ad placed in the paper by Respondent with a deadline of August 21.

This testimony was supported by documents which establish that Avery began her employment with Respondent in 1987, and her job application filed on August 4.

On cross-examination, White was confronted with the minutes of the policy council personnel meeting, dated August 1, which approved all Respondent's personnel decisions that had been recommended by Trucks and White. In that document, the motion passed for Avery after reflecting that the Mobile Unit was not going to be in operation, reflects that Avery is "not recommended to be called back, but with option to reapply for other positions.

Significantly, the motion passed with respect to Sandstedt, Kukla, and Lange was simply that their positions as home visitor were eliminated, due to program design. There was no statement, as with Avery (as well as Lisa Vega, the other teacher in the Mobile Unit), that they had an option to reapply for other positions. When asked about that omission, White testified that it was just an "oversight." Interestingly, for Jane Myers, the motion passed was for her to be called back "subject to opening," which was the same motion that was passed for Sonia Mackay, the other home start teacher at Lake. White conceded that based on the above, her recommendation with respect to Avery was less than her recommendation with respect to Myers. When asked why she selected Avery over Myers, White repeated that Avery had submitted an application when the agency became available, and that Myers had not done so. White admitted, however, that Myers had in fact, indicated to Respondent her interest in another position, but claims that Myers did not do so at the time the opening was filled.

At the end of prior year, Respondent employed Carol Ancisco andE. Skredonis as aides, and Ruth Pratt as a busdriver/side. At the start of the 1995–1996 year, Respondent had planned on calling back these same employees in their same positions so as not to disrupt the program. However, Ansico had a medical problem at the beginning of the year and could not work. Therefore, Respondent transferred Pratt from her busdriver/aide position to teacher's aide. Pratt shortly thereafter decided that she no longer wanted that position and went back to her driver/aide job.

Therefore to fill the teacher/aide position, Respondent placed an ad and hired Ginger Johnson who had never worked for Respondent before. According to White, she did not hire Kukla, Lange, or Sandstedt for the aide position because Johnson had submitted an application or a resume before the deadline, while she did hear from the other three about this position.[46]

Shortly thereafter, Johnson quit, and Ancisco returned from sick leave and filled the teacher/aide position at Manistee. Pratt then became a full-time busdriver.

At the Lake County facility, Smolinski, the previous head teacher, resigned on August 4. At the start of the school year, Respondent's Education Coordinator Leann Hunt filled in for 2 to 3 weeks, until Respondent persuaded Carol Brown to temporarily fill the head teacher's position.

Tracy Battle and Barbara Lewis, who were employed in the prior year as head start center-based teachers were called back in their same jobs.

[45] It is noted, however, that Kukla and Myers both had substantially more seniority than Peabody.

[46] Johnson's resumne was received by Respondent on August 17. Her job application was submitted on September 8 on the day of her interview.

Myers and McKay who were the home start teachers there were not called back since their positions were eliminated.

Tracy Battle resigned on January 5, 1996, as a teacher. Respondent filled that position on a temporary basis, according to White with Lisa Vega. Vega had been employed by Respondent in various capacities since 1991. Her last position was a teacher with the Mobile Unit starting in August 1994, which position was eliminated at the end of the school year in May 1995. Her personnel file indicates that on September 9, 1994, Vega received a letter from Avery, her head teacher and immediate supervisor, criticizing Vega for excessive absenteeism (missing 24 percent of work time since she began as a teacher in the Mobile Unit, as well as 13 percent of the time from the prior year), as well as an inability to and unwillingness to perform recruitment work, and continuously talking about personal problems at work. Thus, Avery states that since Vega is unable to give the required attention to the job, she is recommending that Vega be placed on leave for the remainder of the program year, effective September 12, 1994, so that she can resolve her personal problems. The record does not reflect what happened to Avery's recommendation, or whether Vega was, in fact, placed on leave for any period of time as Avery had suggested.

In any event, the record does reflect that she was separated by Respondent on May 24 for the summer. On August 4 Vega filed an application with Respondent for teacher, teacher assistant, or home visitor positions. According to White, after the start of the school year, she had been informed that Bruce Kent was having difficulty volunteering to act as a busdriver aide on his route. Additionally, a number of busdrivers had also been calling in sick. Therefore, White asserts that Respondent hired Vega as busdriver aide and a substitute busdriver in October, where she served until January 1996 when Battle resigned.

At that time, Respondent promoted Vega to Battle's position as a teacher, but only on a temporary basis until a final decision is made. White testified that Vega wrote her a memo requesting the position. White also claims that Vega is also filling in as a busdriver, while performing the job as a teacher. As of the date of the hearing, White asserts that this job had not been filled on a permanent basis, and that, in fact, no interviews had been conducted to fill this job.

Respondent employed four teacher aides the prior year. One of them, P. Forrest, was not called back for the new year. Respondent did not fill her position, and decided to operate with only three teacher aides and called back King, Candry, and Jennette, each of whom had worked in this position for the prior year.

At the Bitely Center, Lou Ann McCracken had been the head teacher at that facility, and was allowed to remain as head teacher for the new year. Respondent since it decided to change its program design to a home visitor program, according to White, concluded that it would be best to have two cohead teachers, and no regular teacher. White asserts that the program consists of a Monday–Tuesday class in the center, taught by McCracken and a Wednesday–Thursday class, taught by the other cohead teacher, Sonya McKay. Both of them also make home visits to the students.

According to McCracken, the reason why two cohead teachers are required, rather than a teacher and a head teacher, is that it is necessary to have a teacher with a CDA certificate on the premises at all times. Therefore, since McCracken as part of the home start program must be out visiting homes, every other week, she claims that two cohead teachers are required. However, the record reveals that most of Respondent's teachers, including all four discriminatees had a C/D/A, and according to White no other special qualification is required for a head teacher position. White when asked why it was decided to have two cohead teachers, replied only that Respondent concluded that "we could better serve the parents."

As far as selecting McKay for the other cohead teacher position, McKay was as noted of the two teachers at Lake in the Home Start program, whose position was eliminated. White testified that McKay was given the position because she had more seniority than any of the other four,[47] that she was familiar with both home visit and center based, and that the other four employees had not expressed an interest in a head teacher's position.

However, McKay did not fill out a new application for the head teacher position, and significantly White did not testify that McKay had expressed any interest in the job before it was offered to her. Moreover, McCracken testified that when White told her about the change in program at Bitely, and that there would be two cohead teachers, White did not inform her who the other cohead teacher would be, because White had not spoken to McKay as yet to see if McKay would accept the position.

Sherri Fox was the only teacher's aide employed at Bitely, at the end of last year, and she was recalled to her previous position at the start of the year. In late September or early October, Fox was replaced by Amy Allen. Allen had been hired on September 1 as a busdriver, and according to White McCracken (the cohead teacher), requested that White, rather than hire a new teacher's aide, allow Allen to function as a busdriver/aide performing both jobs. White added that none of the four discriminatees had ever expressed any interest in filling a position that involved busdriving.

At Respondent's Summit facility, Carol Brown who had been the head teacher at that center, as noted was transferred to the same position at Manistee. The opening for her position was filled by April Foley, who was one of the two head start teachers employed at Summit the previous year. According to White, Foley was selected for this position, because she had been employed at that center and had expressed an interest in becoming head teacher.

In addition to Foley, Respondent had also employed Diane Rohrer as a head start teacher in the prior school year, and Brown in addition to her head teacher responsibilities in head start was also a head teacher in the MSRP program, with D. Sloan as a teacher in the MSRP program. In the 1995–1996 school year, Respondent decided that it would operate with separate head teacher and a teacher in the MSRP program, and reduce its head start teacher complement from two to one.

Thus, in that connection it hired Linda Dresing and Catherine Hebbing-Smith as head teacher and teacher, respectively in the MSRP program. The testimony of White which is not disputed establishes that the MSRP positions required a Michigan Teaching Certificate. The evidence also establishes that both Dresing and Hebbing-Smith had such a certificate, while Myers, Sandstedt, Kukla, and Lange did not.

For the one opening as a teacher at Summit, Respondent hired Robin Wright, who was a new employee without any previous teaching experience, and who did not have a CDA as did all four of the discriminatees. White explained that Wright

[47] She began her employment for Respondent in 1988.

was selected because she, unlike the four former employees, submitted a timely application and resume prior to the August 21 newspaper advertisement deadline. White's testimony in this regard as supported in part by the resume of Wright which was date stamped as received by Respondent on August 17. However, Wright's job application was dated August 30, and reflects that she was interviewed by three of Respondent's representatives on that date. The comments therein were friendly, cooperative, willing to learn, positive attitude, and would recommend as CDA candidate.

As noted, Wright was interviewed on August 30, the same day that she filled out the job application for Respondent. The interview schedule for Respondent for August 30 contained six names, including that of Wright. One of the names was Kristin Maye, scheduled for interview for the job as teacher in Summit, and Respondent's records indicate that Maye canceled her scheduled interview. White admitted that she did not call in anyone else to fill that slot in the interview schedule. White also admits that Respondent had received an application from Lang for that position on August 22, prior to the interviews being conducted, and prior to the job being filled. White contends that she did not interview Lange for the job, because she did not see the job application that Lange submitted at the time, since it had come in after the deadline.

At the Summit facility, aides Lebrun and Jolly were retained form 1994–1995 to 1995–1996 because they were returning to their prior year positions, according to White. White also asserts then when Labrun left, the position was filled by Marla Nickelson. Nickelson had been recommended by April Foley the head teacher at the facility. Nickelson filed a job application on November 15, was interviewed on November 27 along with two other candidates for this position, Barbara Hector[48] and Robin Vanas.

White further testified that Nickelson was also one of the head start parents, which is why she believed that Nickelson had applied for the position. Finally White also testified that she did not consider Lange, Kukla, Myers, or Sandstedt for this position, because she had not heard that any of them were interested in this position at the time of the vacancy. In fact White also testified that from what she recalls, "[A]t the time the position came open I hadn't heard from anyone but her." (Meaning Nickelson.)

At Respondent's Fountain facility, as noted Charlotte Helgemo was hired as an aide at the start of the school year. According to White, she was selected over Lange, Sandstedt, Myers, and Kukla, because Helgemo's resume had been submitted prior to the August 21 deadline, for the position in the newspaper advertisement. In fact, her resume had been submitted on August 15.

Later on in the school year, Respondent hired another aide at Fountain, Lou Koviak. According to White, Koviak was hired on the recommendation of Sandra Rotzein the head teacher, who had allegedly spoken to Koviak, and sent her to White. Rotzein testified on behalf of Respondent. She corroborated White that she had, in fact, recommended Koviak for the aide position, but that Koviak had to fill out a job application, just like everyone else.

Rotzein also corroborated, in part, the testimony of Sandstedt that they had spoken about the opening for the aide position, filled by Helgemo. Rotzein confirmed that Sandstedt had expressed her interest in the position and that she (Rotzein) had transmitted that request to White. According to Rotzein, White informed her that she would "look into it," referring to Sandstedt's request to be considered for the open aid position. White did not tell Rotzein that Sandstedt needed to fill an application for the position.

White did not testify as to why she did not consider the four discriminatees for the second open aide position filled by Koviak, or explain why she did not at least consider Sandstedt who had admittedly filed an application for the first opening for an aide position on August 22.

In response to questions from me, White asserted that for most job openings, she conducted interviews, but some jobs were filled without an interview. Additionally, White testified that she would discuss each and every recommendation that she made for hire with Trucks, after completion of the interview process. According to White, with respect to Lange, Sandstedt, Myers, and Kukla, when Respondent filled any of the openings described above, she was not aware that any of the four had expressed any interest or that they were still interested in any of the positions available at the time of the selection. White concedes that Respondent may have been in possession of applications or other written expressions of interest from these individuals, but she asserts that she either did not know about or had forgotten about these documents. White further testified that when she discussed these various jobs with Trucks, before the decision was made, the names of none of the four individuals came up and they were not discussed or considered for these positions. When asked specifically about the selection of new employee Marla Nicelson as an aide in Fountain, White claimed that if she did not believe that everyone else was interviewed for the position, and that she did not even "think about" out the four individuals at the time this job was filled.

In this connection, I note that charges were filed by the Union alleging that Respondent discriminated against Lange, Sandstedt, Myers, and Kukla on August 18 and October 10 and 11, the Region issued a complaint alleging in part that Respondent discriminated against these four individuals by refusing to recall them and by refusing to hire or consider them for other vacancies.

b. Analysis

Kukla, Lange, Sandstedt, and Myers were all outspoken supporters of the Union, which was well known to Respondent at the time of their separation from Respondent's employment. Thus, Kukla, Sandstedt, and Lange spoke in favor of the Union, and attended union meetings in presence of their supervisor, Sandra Rotzein. Moreover, Kukla and Lange were subpoened by the Union to testify at the representation hearing. Kukla testified, and while Lange did not, she did attend the hearings and openly assisted the Union and its counsel during the course of the hearings.

Myers was chosen to be a member of the Union's bargaining committee, and Respondent was so notified on June 21. Moreover, Respondent's agent, David Parmentier, in the presence of White, while asking Respondent's supervisors about their knowledge of union sentiments of employees, was told by Diane Smolinski, that Myers' husband was a member of the Teamsters Union, which Parmentier duly noted on paper.

Lange was subject to what I have found to be an unlawful threat by Rotzein, as well as a statement by Trucks that if

[48] Hector had answered an advertisement of Respondent on October 11.

Lange was subpoened by the Union, she must have signed a card and be a union supporter. I have found that the latter statement is indicative of antiunion animus by Trucks.[49]

Moreover, I also note the numerous other findings that I have made above of unlawful conduct by Respondent, particularly the threats and statements made by Trucks (and Clark to employees, quoting Trucks) that Respondent would terminate employees and/or not fight for funding for employees who supported the Union and/or who testified at the hearing on behalf of the Union, as well as the discriminatory terminations of Smith, Belongia, Monton, Burkel, Fugere, and Larson-Anderson.

These actions of Respondent coupled with the above-described knowledge by Respondent of the union sympathies of these four employees, are more than sufficient to establish that protected conduct of these employees was motivating factor in Respondent's decision not to recall them back to work in August.

Therefore, under *Wright Line*, the burden shifts to Respondent to establish that it would have taken the same action against these employees, absent such protected conduct. I conclude that once again Respondent has fallen short of meeting its burden in this regard.

The testimony of Trucks, with some support from testimony of other witnesses, asserts the decision was made to eliminate home start positions in Lake County and Manistee, as well as the Mason mobile unit, because of the recently passed and proposed stringent welfare work requirements, which would make it difficult for parents to be home while the teachers were visiting their homes.

However, I find the testimony of Kukla, Lange, Sandstedt, and Myers, supported by former supervisor of Respondent, Diane Smolinski, credibly establishes that the welfare work requirements were not and would not likely have been a major problem in causing parents to drop out of the home visit program. This testimony, which was not seriously disputed by Respondent's witnesses, shows that the teachers were able to accommodate their schedules to meet the schedules of the parents, even to the extent of meeting with them in the evenings. Moreover, these witnesses' testimony demonstrates that enrollment would not necessarily have been diminished, inasmuch as there were siblings of prior students who had expressed interest in signing up for the program.

In that connection, although Respondent presented some figures which demonstrated that enrollment had diminished at the end of the school year at Manistee and Lake County, the record also reveals that enrollment normally is reduced at the end of year, and that it is increased at the start of the new school year by recruiting and other factors. Significantly, Respondent produced no records from prior years so one could compare the year-end figures with the current year insofar as reduced enrollment was concerned at these facilities in this program.

I also rely on the fact that in their pretrial affidavits both Trucks and White had emphasized that Respondent had placed significant reliance upon parent surveys that they had received, in making its decision to eliminate the program. However, the parent surveys that were produced by Respondent were introduced into the record by the General Counsel, and they produce no support for the testimony of Respondent's witnesses. On the contrary, these surveys contradict totally the assertion of Trucks and White that these parents complained about the home start program in general or the affect of the new welfare rules on their ability to meet with the teachers in their homes.

The surveys contained overwhelmingly positive assessments of the home start programs in general and the teachers in particular. The surveys praised the one-on-one aspect of the program, as well as the flexibility that the program provided. More importantly, none of the surveys contained any complaints or references to parents' inability to meet with teachers for any reason, much less due to increased work requirements imposed by the new welfare rules. I find that this contradiction to the testimony of Trucks and White seriously undermines Respondent's ability to meet its *Wright Line* burden.

Moreover, Trucks' testimony that Respondent's decision to eliminate the mobile unit in Mason County at the same time as it phased out home start in Manistee and Lake County, was made for the same reasons also does not withstand scrutiny. Indeed, both the testimony of White and the minuets of Respondent's policy personnel committee completely contradict Trucks' testimony, and indicate that the decision to eliminate the mobile unit was made for completely different reasons: i.e., the mobile classroom was constantly in need of costly repairs.

Finally, I also rely upon the facts, as more fully described below that Respondent discriminatorily refused to consider or offer to these employees other available positions for which they were clearly qualified. In addition to being independent violations of the Act, such unlawful refusals to offer them other positions provide support for finding that the initial decision not to recall them was similarly unlawful, and that Respondent has not established that it would have taken the same action against them, absent protected conduct. *Kinder-Care Learning Centers,* 299 NLRB 1171, 1176 (1990).

Accordingly, based on the foregoing, I conclude that Respondent has failed to meet its *Wright Line* burden of proof, and that Respondent's decision not to recall Lange, Sandstedt, Kukla, and Myers in August, was violative of Section 8(a)(1) and (3) of the Act, and with respect to Kukla and Lange, in violation of Section 8(a)(1) and (4) of the Act, as well.

As noted, it is also alleged by the General Counsel, as independent violations, the unlawful refusal to hire or consider these four employees for other available positions. In that connection, it is significant that not only did Respondent fail to advise these employees that their jobs had been eliminated until the employees called themselves to inquire, but that White provided the employees with misleading and incorrect information to them as to the availability of other jobs, advising them only of jobs that White believed that they were not qualified for or not interested in applying for.

Thus, when Kukla on or about August 11 asked about any other positions in the agency that were open, White mentioned only the teaching position at Summit that required a ZA endorsement that White knew that Kukla did not have and therefore was not qualified to fill. Significantly, White did not tell Kukla about two other openings at the same Summit facility,

[49] This remark could also be construed as an additional example of an unlawful interrogation, since although not in the form of a question, was calculated to elicit a response from Lange about her union sentiments. *NLRB v. McCullough Environmental Services,* 5 F.3d 923, 929 (5th Cir. 1993). However, since this remark was not alleged to be unlawful, and such a finding would be cumulative, I need not and did not find that the statement violated the Act.

the positions of head teacher and teacher,[50] both of which Kukla was qualified to fill, or about the opening for a head teacher position at Manistee, the facility where Kukla had previously worked, or at Lake County which was also open. Similarly, at around the same time Sandstedt asked White if there were positions available for teachers or teacher's aide. White once again informed Sandstedt only of the same teaching position available at Summit that required the ZA endorsement that Sandstedt did not have, while again failing to mention the other available teaching position at the same facility that Sandstedt was qualified to fill. White also mentioned the availability of the head teacher positions at either Summit or Lake County. It is quite revealing that White mentioned the availability of two head teacher positions to Sandstedt, where Sandstedt had asked only about teacher or aid positions, while conveniently failing to disclose to Kukla, who had asked about any available positions, and who had previous experience as a head teacher, these same available head teacher positions.

On or about August 12 Lange spoke to White personally and asked about any other positions that she was qualified for. White replied not at her center. Lange then asked about positions at other centers. White replied that Respondent had employees, "center by center." This response by White is clearly false, since the evidence is replete with instances in the past, as well as in the current year, where Respondent filled vacancies by moving employees from one center to another. Finally, Myers also spoke to White on or about August 11, and asked to be considered for any position that became available that she was qualified for, especially in Lake County, but not exclusively in Lake County. White replied that Respondent had a head teacher and busdriver position open. However, White failed to notify Myers about the availability of the aforementioned teacher's position at Summit, which she also did not inform the other three about and which was ultimately given to a new employee. White also failed to mention to Myers, or to any of the other three employees either, the availability of teacher's aide position at Fountain, which was also filled with a new employee, Charlotte Helgemo.

White's misleading and/or false statements to the employees concerning the availability of other positions for which they were admittedly qualified, coupled with the above-described numerous other violations of the Act committed by Respondent, are more than sufficient to establish that a motivating factor in Respondent's decision not to consider or hire these four concedely well qualified and exemplary employees for other positions was their protected conduct.

Respondent's attempt to meet its burden of establishing that it would have taken the same action against these employees, absent their protected conduct has fallen far short. Indeed an examination of White's inconsistent and unconvincing testimony, which was essentially Respondent's evidence in this regard, only serves to reinforce the above conclusion that Respondent's conduct was unlawful.

Thus, while in many cases, Respondent simply called back the incumbent employees in their same positions at the same centers, the evidence revealed that a number of vacancies arose in positions at various centers at the start of the school year, as well as during the course of the year. White attempted to explain Respondent's decisions with respect to these vacancies, and more particularly why Lange, Myers, Sandstedt, or Kukla were not selected. I found for the most part White's explanations to be unpersuasive and improbable, and frequently inconsistent with her explanations with respect to other positions or with respect to other potential applicants.

For example, at the Manistee center, where Kukla, Sandstedt, and Lange previously worked, an opening was available for a head teacher's position, which was filled by Patty Peabody, who had been a teacher at that center. White asserted that Peabody was selected because Lange, Sandstedt, and Myers had never been a head teacher before, and Peabody had more seniority than Lange. However, when it came to Kukla, who had substantially more seniority than Peabody, and had previous experience as a head teacher, White offered the rather lame excuse that Kukla had not indicated to White that she was interested in a head teacher's position. This explanation lacks credence, since Kukla had, in fact, asked White about any other positions in the agency that might be available, and White significantly failed to disclose the existence of this open position (as well as others) to Kukla. Moreover, White furnished no testimony that Peabody had in fact or when she expressed interest in the head teacher's position, or as to the precise circumstances of her selection.

During the course of the school year, a teacher's position became available at Manistee, when Carol Braun was transferred to the head teacher's position at Lake. This position was filled by Lorraine Avery on September 21. Avery had previously been employed by Respondent as head teacher in the mobile unit, which was also eliminated for this school year. According to White, Respondent chose Avery because she had more seniority than any of the four home visit employees, and because Avery had submitted a timely job application, prior to the August 21 deadline for the position in the newspaper advertisement. When confronted with the fact that Myers had received a more favorable recommendation than Avery in the policy council meeting, White asserted that Avery had submitted a timely application for the position, and that Myers had not done so. However, it is clear that Myers, as well as the other three employees had orally expressed interest to White for any available positions only a month or so before this position was filled. Yet, none of these four were even interviewed for the position. Moreover, they all had submitted written applications prior to the date that this job was filled.

A vacancy at the Manistee center for a teacher's aide was filled by Ginger Johnson on September 8. Johnson was a new employee who had never worked for Respondent. White explained that she did not select the four discriminatees for this position because Johnson had submitted a timely resume, prior to the application deadline, while she did not hear from the others about this position. I find White's testimony here to be disingenuous, if not totally false. I note that all four of the employees, three of whom had worked at the same facility had expressed interest in other available positions directly to White. White admittedly could leave simply added these employees to the interview schedule, even though they had not submitted timely applications for this particular job. White's testimony that she simply forgot about these employees strains credulity, particularly since charges had already been filed with the National Labor Relations Board alleging that Respondent discriminated against these four employees.

At the Lake County Center, Smolinski's resignation created an opening for a head teacher. At the start of the year, Educa-

[50] Most importantly, this position was ultimately filled with a new employee with no previous teaching experience.

tion Coordinator Lee Ann Hunt filled in for several weeks, until Respondent, according to White persuaded Carol Brown, who had previously been permitted by Respondent to step down from a head teacher's position to revert to a teacher's position, to take the job temporarily. Yet, Respondent ignored Kukla, who had previous experience as a head teacher, and expressed interest in any available position. White furnished no explanation as to why Respondent found it necessary to persuade Brown, who clearly did not want a head teacher's position to go back to that job, while not even asking Kukla if she was interested in the position. Indeed not only did Respondent not ask Kukla about it, but White failed to disclose to Kukla this opening, at the same time that she mentioned it to Sandstedt, whom White knew was not interested in the position.

In January 1996 an opening for a teacher at Lake County was filled by Lisa Vega, allegedly on a temporary basis. Vega had previously been employed by Respondent in the mobile unit as a teacher. She was not called back initially because her position was eliminated, but was subsequently hired as a combination busdriver aide at Lake. Myers found out about this opening, and submitted an application for it in early January 1996.

White provided no explanation as to why she did not consider or hire Myers for this position. I note that Myers had previously worked at this facility as a teacher, and had many more years of experience than Vega. Additionally, Vega's personnel file revealed a highly critical memo from her supervisor in the mobile unit, which had recommended that Vega, in effect be suspended for the remainder of the year.

Thus, Respondent chose to fill this position with such an employee, rather than choose the more experienced, highly rated teacher who had taught at the facility before. While White asserts that this is only a temporary promotion for Vega, Respondent has still given no indication by testimony of White or otherwise that Myers was being considered for this position.

At Respondent's Summit facility, an opening for the head teacher's position was filled by April Foley, who had previously been a teacher at that facility in the previous year. I once again find it significant that White failed to disclose the existence of this position to Kukla, who unlike Foley had previous experience as a head teacher, and had more seniority than Foley as well. This promotion created an opening for a teacher at Summit, which was as noted filled by Robin Wright, a new employee, with no previous teaching experience, and without a C/D/A certificate which all four discriminatees had already obtained.

White's explanation for selecting Wright was once again that Respondent had received a timely application from her for the position, and it had not received any from the four home visit teachers by August 21, the deadline in the advertisement. In fact, Wright did not submit a job application until August 30, the date of her interview, although she had submitted a resume on August 17. However, the evidence disclosed that there was at least one cancellation of the applicants scheduled to interview for this position, but Respondent did not fill it with Lange who had admittedly submitted an application for this position on August 23, prior to the position being filled. It is also significant that Respondent's head teacher at that facility, April Foley, had informed Lange about the vacancy, which had been caused by Foley's promotion, and told Lange that she could not understand why Lange had not been offered the position and she would love to have Lange working with her. I note that Foley did not testify. It is appropriate to draw an adverse inference against Respondent for failing to call Foley as a witness, and conclude that her testimony would be adverse to Respondent on this issue. *International Automated Machines,* 285 NLRB 1122, 1123 (1987). I infer that based on this credited testimony of Lange, that Foley, in fact, recommended to White that Lange be hired for this position. This finding further undermines Respondent's defense with respect to this position, which is already highly suspect in any event, since White's testimony that she simply forgot about Lange or the other employees when making this as well as other selections is as noted above not believable.

A teacher's aide position subsequently became vacant at Summit, which Respondent filled in late November, with Marla Nickelson, another new employee. White asserted that Nickelson was chosen because she was a head start parent and was recommended by April Foley. White added that she did not consider any of the four discriminatees for this position, because she had not heard from anyone that any of them were interested in that particular job.

Once more I find White's explanation not to be convincing. I again note Respondent's failure to call Foley as a witness to corroborate White, which leads to an adverse inference. Foley if called would not have confirmed that she had recommended Nickelson. Moreover, even if Foley recommended Nickelson, Respondent did not adequately explain why it chose to follow Foley's recommendation and hire Nickelson, while ignoring a similar recommendation by Foley to hire Lange for the teacher vacancy filled by Wright.

Additionally, White's unconvincing testimony that she did not consider the four discriminatees for this position, because she did not believe that they were interested, is further undermined by the fact that by this time the Region had issued a compliant alleging that Respondent refused to recall these employees to their prior positions, as well as to other vacancies.

Finally, White testified that Nickelson was the only person that she interviewed for this job, and that no one else had shown any interest in the position. However, Respondent's records indicate that on November 27, the day of Nickelson's interview, it also interviewed two other applicants for this position, Barbara Hector and Robin Vanas. Thus, Respondent has adduced no credible evidence as to why any or all of the four discriminatees, who by this time had all submitted written applications for jobs and had orally expressed interest to White for any open positions, were not even interviewed for this position.

At Respondent's Fountain facility, Respondent hired two teacher's aides, Charlotte Helgemo at the start of the school year in early September, and Lori Koviak in December, when another opening developed. Once again White's explanations for why she neither considered nor hired Lange, Sandstedt, Myers, or Kukla for either of these positions does not withstand scrutiny.

It is noted initially that both Helgemo and Koviak were new employees with no previous experience working for Respondent. Rather than hire any of the four experienced employees who were all well qualified for these positions, Respondent decided to hire two new experienced employees. White's assertion that she made this decision because she did not know that any of them were interested in these positions, and/or had not filed applications for these jobs is contradicted not only by evidence that all of the employees had as noted expressed interest to her for any open positions, but by Respondent's own

supervisor, Rotzein, who corroborated Sandstedt that she (Rotzein) informed White of Sandstedt's interest in the position filled by Helgemo prior to the job being filled.

Since it is admitted that Sandstedt filed an application with Respondent specifically for this position on August 22, Rotzein's testimony refutes White's assertion that although Respondent may have received the application, that she did not see it since it came in after the deadline and that she was, therefore, unaware of Sandstedt's interest in the job prior to interviewing or selecting the new employee for hire.

Finally, at Respondent's Bitely center, where as noted Respondent instituted a home visit program for the first time. Sonya McKay who had been along with Myers, a teacher at Lake where their positions were eliminated, was selected to be a cohead teacher at Bitely. While White testified that McKay was chosen over the four discriminatees because of her superior longevity, and because the others had not expressed an interest in the head teacher's position, her testimony in this regard is not convincing.

While McKay did have more seniority than the other employees, it is significant that Kukla had previous experience as a head teacher while McKay did not. White's testimony that the failure of the other employees to show interest in the position was a factor in her decision, is clearly pretextual. Thus, McKay did not fill out a new application for this position, which not only undermines White's testimony on this issue, but also her testimony that she gave with respect to the alleged significance of the four discriminatees to file applications for other open positions.

Also, White furnished no testimony that McKay had expressed any interest in the position, and the testimony of McCracken, Respondent's own supervisor indicates that White needed to convince McKay to accept the position at Bitely. It thus appears likely that Respondent contacted McKay and asked her whether she would accept the position. Yet it made no effort contact Kukla who had previous head teacher experience and had expressed interest to White in any available positions, or years who had similar qualifications to McKay, and had also made a similar request to be considered for other positions.

In this connection, Respondent argues that Myers, on the stand, indicated that she had no interest in a head teacher's position because that would remove her from the bargaining unit. However, this admission by Myers is not controlling, since there is no evidence that Respondent was aware of Myers' position in this regard, and that it never offered Myers or Kukla the opportunity to decline the position.

This point, however, does raise an issue concerning the question of why Respondent opted to create two head teacher's positions at Bitely. This is apparently an unusual unpredicted action, which results in the head teacher having no teacher under them to supervise. The explanation given for this decision by White and by McCracken are totally different and unconvincing. Indeed McCracken asserted that the reason was the necessity to have someone with a C/D/A certificate on premises at all times. This testimony is clearly incorrect, since all of the discriminatees had a C/D/A and there is no special requirements for a head teacher position.

Therefore the conflicting explanations given by Respondent's witnesses as to the reasons for this decision, leads to the conclusion that the action was motivated by a desire to remove a position from the bargaining unit, as well as to further provide a subterfuge for Respondent's termination of the employment of the dicriminatees and its failure to offer them other available positions.

Based on the foregoing analysis, I find the explanation given by White for Respondent's decisions on hiring to be for most part clearly pretextual. Her generalized testimony that she did not consider. Lange, Sandstedt, Myers, or Kukla for any available positions because she was unaware of their interest is preposterous, as I have detailed above. Equally unbelievable is her testimony that when she discussed the various vacancies with Trucks, the names of these four individuals never came up. Since charges were already on file, alleging discriminatory treatment of the four employees by Respondent, I find it difficult to believe that the subject of whether or not to offer them other positions was not discussed. I find it most probable that Trucks simply instructed White that these four are not to be hired or considered for any available positions, and that White simply carried out Trucks' orders in that regard. No other reasonable explanation is warranted in view of the numerous positions as discussed above that become available that these employees were qualified to fill, where not only were they not hired, but not even given the courtesy of an interview.

Accordingly, I conclude that Respondent has failed to meet its burden of establishing that it would have failed to consider or hire these employees for available positions, absent their protected conduct, and that it has thereby violated Section 8(a)(1) and (3) of the Act, and Section 8(a)(1) and (4) as well with respect to Kukla and Lange.[51]

14. The alleged unlawful conduct with regard to busdrivers

a. Facts

Bruce Kent was employed by Respondent as busdriver since August 1992. Kent first contacted the Union in 1994, spoke to other employees about the Union, attended union meetings, and was a member of the Union's bargaining committee.

As a busdriver, Kent as well as other busdrivers employed by Respondent would pick up students at their homes in the morning and drop them off at the Lake County Center in Idlewild. They would then drive the bus home and return to pick up the children after the school day ended and drive them home. Drivers had always been permitted by Respondent to take their buses home at night.

Respondent's policy with respect to payment had generally been to start drivers pay 15 minutes before they picked up the first rider and end when they drop off the students at the school. For the afternoon, drivers were paid from the time that they picked up the students at school until they dropped off the last rider. However, at the Lake County Center, Kent drove what is known as the Irons run. This run required drivers to drive 45 minutes before they picked up the first student. On that run for the entire time of Kent's employment, he was permitted to charge for his time from 15 minutes before he left his home and in the afternoon he would charge from the time he left home until he dropped off all students and had driven home. This policy was explained to him by his supervisor, Diane

[51] I would note that this finding is unaffected by and independent of my previous conclusion that Respondent's decision not to recall these employees initially (and its decision to terminate the home visit program at Manistee and Lake) was unlawfully motivated. Even had I found that action to be lawful, the evidence is overwhelming that the subsequent refusal to offer them other positions was nonetheless unlawful.

Smolinski, and was also applied to other employees at the center who drive that run.

Every 2 weeks, Kent and other drivers would turn in to Smolinski their timesheets and driver's log which show the time that they left their house and when they returned. After being reviewed and approved by Smolinski she sends them to the Scottville office, where they are again reviewed and payment is made.

Smolinski confirmed that this was the policy at the center for all employees, including Kent who drove the irons run since at least 1987 when she began working at the facility. According to Smolinski, when she became head teacher, the previous head teacher, named Cindy, explained to her that because it was such a long run, this was the policy that Respondent followed with respect to payment of busdrivers. Smolinski had approved such payments, sent along to the office the accompanying documentation, and had never had any payments questioned by management or told that this policy was improper for that run.

Starting September 1995, Kent became the only driver on the irons run, and he drove it 4 days a week. Kent computed his time as per the normal procedure, and it was approved by the new acting head teacher as well as by the office of Respondent for several weeks.

On September 22, Kent received a call from White. White asked Kent why he had put down 7 a.m. on his timesheet, and Kent replied that is when he started inspecting his bus. White responded that he was not supposed to start his time until he had someone on his bus. Kent answered that he had always done it this way in the past and suggested that White check with his former supervisor, Diane Smolinski.

White then telephoned Smolinski at home (she had previously resigned), and asked her about the policy with regard to paying busdrivers at Lake. Smolinski explained that for the Irons run, which required 45 minutes driving time, the policy had been to pay drivers from the time that they left their homes. She added that this policy had been explained to her by the previous head teacher, and that she continued to follow it. White inquired if anyone from the office had ever questioned this policy? Smolinski answered no and asked if there was a problem. White replied no, that she (White) was new and was trying to learn the ropes.

Nonetheless, on September 22 and again on September 27, Respondent by White issued written reprimands to Kent. These letter stated that he had knowingly violated Respondent's policy with regard to payment, and that Respondent's policy has always been and still is to start a driver's time when the first child is picked up. The September 22 letter refers to Kent's assertion that a former head teacher had authorized him to charge his time from the time he left home, and commented that, "there is no record in the file to support your claim." Further Kent was instructed that his time will be carefully monitored, and he must start charging time from his first pick up. If he does not do so, the letter adds that he will be "terminated immediately."

Respondent adduced testimony from several current head teachers, including Carolyn Burba, Sandra Rotzein, and Luann McCracken who testified that as far as they knew Respondent's policy had always been to charge time from when the pick up was made, and this policy has been explained to all head teachers at head teachers' meetings, as well as to busdrivers in yearly orientation meetings.

However, none of these witnesses testified whether the specific subject of whether Respondent may have allowed a different policy at Lake County for the Irons run had been discussed at any of these meetings.

At the next bargaining session after these reprimands, the subject of whether to pay busdrivers for time between their homes and first pick-ups was thoroughly discussed. As part of Respondent's proposals on working hours, a section dealt with busdrivers' time. The proposal essentially reflects what Respondent's policy had previously been for all but the irons run in Lake County. It called for pay to start 15 minutes before the first pick up, and end 15 minutes after the last drop off, plus an additional 15 minutes to perform daily posttrip vehicle inspections.

Maro Holland the Union's chief negotiator rejected this proposal and stated that he felt that drivers should be paid from the time they leave home. Holland added that he intended to file charges with the Wage and Hour Division if Respondent implemented such a proposal. The parties then caucused. After the caucus, Terry Mroz, Respondent's attorney stated that Respondent did not wish to get into a court battle over this issue and proposed that Respondent would agree to pay drivers from the time they started driving (plus 15 minutes), but that in exchange employees could no longer take their buses home at the end of the day, and would drop the buses off and pick them up the next morning at designated central sites. The Union agreed to this proposal, which Respondent indicated it would implement in the near future. No mention was made of which specific sites would be selected, but only that Respondent would let the employees know where to park their buses. Holland made no request that Respondent consult with or notify the Union concerning which central sites would be chosen for which employees.

On October 4, Respondent, without furnishing a copy to the Union, issued a letter to all drivers, dated October 3. The letter states that in response to the Union's bargaining committee's request, effective October 9, drivers worktime will start when they pick up their vehicles. The letter goes on to designate the site where each driver would be required to park his bus. Respondent had determined without consulting the Union, that there would be three central locations for employees to park their buses, with each employee being assigned one of three locations by Respondent.

At the next bargaining session, October 4, the subject arose as to whether drivers were to be allowed to drive their buses home after dropping the children off in the morning. Respondent took the position that if the Union was going to insist that drivers be paid for the time that they drive back and forth between the center and their home during this interim period, then the employees could not take their buses home, as they had been allowed to do in the past. Similarly, Respondent also stated that if the Union took the position that employees should be paid if they remain at the center during this period, then they would not be permitted to remain on the premises.

The Union by Holland did take the position that employees be paid for time spent driving back and forth, as well as time spent at the center. However, Holland also suggested that employees be allowed to drive their buses from the center to the designated site where they parked their cars, so that employees would have transportation to go somewhere else during this 5-hour period. Respondent rejected this proposal, and insisted that the employees must park their buses at the center, and

leave the facility until they were to take the children home. Holland asked what the employees were supposed to do during the 5-hour period, particularly since many of the centers were located in rural areas with no public transportation or public places where drivers could walk to during these off hours. Trucks replied to this inquiry and stated that this was not her concern and suggested that the drivers could take a taxi, dial-a-ride, or whatever they wanted to do.

Mroz proposed that Respondent would permit the drivers to take their buses home if the Union obtained clearance from Wage and Hour that employees would not receive pay for this period, or if the Union agreed to indemnify Respondent for any such claims. The Union declined either of these options, and the meeting ended with these issues unresolved.

However, immediately after this meeting, Respondent's supervisors instructed its employees that employees must park their buses at the center after they drop off children in the morning, and must leave the center until they were needed to drive the children home. This included a prohibition on employees volunteering at the centers, which employees had always been allowed to do in the past.

On October 5 and 6, a number of the drivers made complaints to their head teachers and in writing about Respondent's new policy, claiming that the new policy would cause a hardship to them because of their particular routes. White subsequently held a staff meeting on October 6. After listening to these complaints from some drivers, White informed them that the new policy was the idea of the Union, and suggested that if they had complaints about it, they should either communicate with the Union in writing, or speak to their union representative. Several employees did write to the Union and the bargaining committee, and requested permission to return to the old system of taking the bus home and not receiving pay until someone is on the bus, plus 15 minutes for inspection.

On October 9, Respondent issued another memorandum to employees, without notifying or consulting with the Union. This memo was issued, according to White because of the complaints from drivers about the new policy, including one driver who threatened to quit. The memo is entitle "[O]ptions on [P]arking of [B]uses." It reflects two options for employees to choose. Option 1 requires that employees state that the new policy would create a hardship for the employee, and that in consideration of allowing the employee to take the bus home at night and between runs, the employee agrees not to be paid from (1) home to first pick up, except for 15 minutes for pretrip inspection, (2) to drive home and back to the center between runs, and (3) to drive home after the last child is dropped off.

Option 2 reflects that the employee agrees to park the bus at a designated area, and that time starts when the bus is picked up at the designated area, and will end when the children are unloaded at the center. The bus will then be left at the center between runs, and time will start again when the bus is picked up at the center and end when the bus is dropped off at the designated parking area.

The memo further indicates that if the employees do not request option 1, the policy that went into effect on October 9, as stated in option 2 is in effect and must be followed.

White met with drivers on October 11 at the Bitely Center. White informed the employees that Respondent had formulated these options to make it easier on the drivers, because some of them found the present policy difficult. Employee Elizabeth Zebruyne responded she had been told by the bargaining committee that employees did not have to sign the memo, as requested by Respondent. Zebruyne also told White that she felt that employees should be paid from the time she gets on the bus, since if there was an accident they would be on Respondent's time. White answered that Respondent's insurance would cover the employees, whether or not they were paid at the time of the accident. White also told the employees that if they did not sign the form and choose one of the options, they would be terminated.

Most employees signed the forms as ordered, and chose one of the two options. A few employees refused to sign and did not do so, including Kent and Zebruyne, but were not terminated. However, Kent and employee Floyd Davis received a counseling form from Respondent, citing their refusal to sign and to choose one of the options. These forms indicated that the employee, therefore, is deemed to have chosen option 2.

After the new policy with regard to parking at designated sites went into effect, Kent was initially informed by Head Teacher Carol Brown to park his bus at the Respondent's warehouse, located 3/4 of a mile away from Respondent's Scottville center. On October 12 Brown changed her previous instructions and told Kent to park his bus at the Scottville office. However, Kent did not comply with this order and parked the bus at the warehouse, since his truck was already at the warehouse and the woman who he usually came to work with was absent. On his next workday, once again Kent parked his bus at the warehouse, because the other employee was still out sick, and this employee would not be available to help shuttle Kent back and forth.

On or about October 17, Kent received a memo from White dated October 16. The memo recites that Kent had twice parked his bus at the warehouse, contrary to specific instructions from his supervisor. It also reflects that when Kent was reached at his home, he stated that he had left his vehicle at the warehouse and, therefore, needed to return the bus there. The memo further reflects that White instructed Kent to park the bus at the office on October 17, and someone will give Kent a ride to his vehicle. The memo concludes by stating that "continued failure to "comply will result in disciplinary actions."

Additionally, on October 16, the busdrivers at the Bitely Center were told by their supervisor that they would be no longer be paid for posttrip inspections as they had in the past. Zebruyne and another driver, Amy Allen, complained to Supervisor McCracken that they thought that it was state requirement that buses be postinspected. McCracken replied that she had received a call from the Scottville office and was told to inform employees about the policy change. The Union was not consulted or informed about this action nor given the opportunity to bargain about it.[52]

b. Analysis

The record reflects that on September 22 and 27 Respondent issued disciplinary memoranda to Bruce Kent accusing him of knowingly violating Respondent's policy with respect to the calculation of his time. At the same time Respondent changed its prior practice with respect to how it paid drivers, such as Kent at Lake County who drove the "Irons" run.

[52] The record does not reflect whether or not Respondent instituted this change at any other center.

I agree with the General Counsel that these actions of Respondent are violative both Section 8(a)(1), (3), and (5) of the Act. Respondent contends that there was no change in policy since the evidence demonstrates that Respondent consistently paid its employees only from the time that children were on the bus, and that this policy was explained and reinforced at annual orientation meetings.

However, notwithstanding this evidence, I conclude that an exception to this rule had been in effect at Lake County for the "Irons" run, and that this exception had been condoned by Respondent. Thus, the unrebutted and credible testimony of Smolinski establishes that she was told by her predecessor as head teacher that Respondent permitted a different method of payment for the "Irons" run because of the long distance involved. Moreover, the evidence establishes that the employees' timesheets and logs are sent into the Scottville office for final review prior to payment being authorized, thus further demonstrating that Respondent permitted this exception for this particular run.

Accordingly, since Respondent admittedly failed to notify or consult with the Union before making this unilateral change in terms and conditions of employment, it has thereby violated Section 8(a)(1) and (5) of the Act. Moreover, by disciplining Kent for not abiding by the change, Respondent has further violated Section 8(1)(1) and (5) of the Act. *Boland Marine & Mfg. Co*., 225 NLRB 824 (1976), enfd. 562 F.2d 1259 (5th Cir. 1977).

I also conclude that Respondent's decision to change this prior practice which affected only Kent, a leading union adherent and member of the bargaining committee, as well as its issuing disciplinary memos to him, were motivated by Kent's union activities. In that connection, I note the prior above-described unfair labor practices against other union supporters.

I also find that Respondent has not shown that it would have taken the same action against Kent, absent his union activities. Indeed, Respondent adduced no testimony from any witnesses as to why it suddenly decided to change its prior practice with respect to payment on the "Irons" run, nor why it accused Kent of "knowingly" violating company policy, when it knew from speaking with Kent's former supervisor, that she had permitted such reimbursement in the past based on instructions from the prior head teacher and without any questions from the main office.

Accordingly, Respondent has violated Section 8(a)(1), (3), and (5) of the Act by issuing disciplinary memorandum to Kent in September, and by changing its prior practice with respect to payment for his route.

As far as the October 16 disciplinary letter is concerned, the General Counsel argues that Kent was given this warning in order to paper his file with discipline over minor matters in order to lay the ground work for firing him, in violation of Section 8(a)(1) and (3) of the Act. I do not agree.

Even assuming that the above-described evidence of discriminatory actions of Respondent towards other union supporters as well as Kent, establishes that a motivating factor in this letter was Kent's protected conduct, I conclude that the evidence establishes that Respondent would have taken the same action absent any protected activities of Kent.

Thus, the evidence is undisputed that Kent blatantly disobeyed lawful instructions of his supervisor to park his bus at Respondent's office, rather than at the warehouse. Whether or not Kent may have believed that he had a legitimate reason for disobeying these instructions is not determinative. I believe that Respondent legitimately issued him a warning letter for twice disobeying a direct instruction of a supervisor, and that it would have done so, absent his protected conduct.

I shall, therefore, recommend dismissal of this allegation of the complaint.

The complaint also alleges and the General Counsel contends that Respondent violated Section 8(a)(1) and (5) of the Act when it issued its memo of October 4, announcing the change in payment policies for busdrivers which were agreed to during negotiations, and added the specific sites that where employees would park, without consulting or notifying the Union. I disagree.

While the General Counsel is correct that the specific sites where employees would not park was not discussed or agreed to during the meeting, I conclude that the Union implicitly agreed that Respondent would make the selection. Thus, it is undisputed that the Union agreed that Respondent would immediately implement the new policy agreed upon with respect to when to start time for busdrivers, and that Respondent stated that it would notify the employees which specific site they would be required to park their buses. The Union made no attempt to negotiate about which sites would be selected by Respondent, nor did it request that Respondent consult with it before making such a decision. Therefore, I conclude that by such conduct the Union implicitly agreed that Respondent would have the unilateral right to make such a selection, or that it waived its rights to bargain over such matters. Therefore, I conclude that Respondent has not violated the Act by failing to notify or consult with the Union before issuing its memo designating the specific sites for parking the buses.

After the October 4 bargaining session, Respondent implemented changes in prior practice, by not allowing drivers to take their buses home during the 5-hour period between runs, and by prohibiting employees from remaining at its facilities during this hiatus period. Respondent did not notify or consult with the Union about these changes. While these subjects had been discussed at the October 4 bargaining session, there was no resolution of the issue nor was there an impasse on these subjects. Therefore, Respondent was not free to make these changes, absent impasse or the consent of the Union.

Respondent seeks to defend its actions by attempting to blame the Union, and arguing that it only acted as it did because the Union was insisting at the bargaining table that employees be paid for any time on the bus or at the center. However, these arguments provide no defense to Respondent's conduct. These issues were still the subject of negotiations and had not been resolved. Whatever postion the Union may have taken at the bargaining table, or whatever threat the Union may have made to file wage and hour charges, Respondent is obligated to maintain the status quo until impasse or consent. Since the status quo with respect to these issues was Respondent's prior practice of allowing employees to drive their buses home and to remain on the premises (whether they volunteer or not), without being paid for this time, Respondent was not free to change such practices.

Accordingly, I conclude that Respondent has violated Section 8(a)(1) and (5) of the Act by such conduct.

The evidence also establishes that after this October 4 meeting, Respondent issued a memo to employees dated October 9 offering them two options with respect to issue of calculating busdrivers' pay. In connection therewith, Respondent met with

employees, discussed these issues with them, and required them to sign this document, selecting one of the two options. The Union was not provided with a copy of this memo before its implementation, nor was it consulted about Respondent's decision to offer these options to employees.

Since these matters were clearly the subject of negotiations between the parties, Respondent was obligated to bargain with the Union about such matters, and not to discuss them directly with employees. Such tactics are clearly antithetical to the bargaining process and had the affect of undermining the Union. Such a finding is forcefully demonstrated by Respondent's conduct of blaming the Union for the dissatisfaction among some employees with the new system which had been agreed upon during negotiations.

Accordingly, I conclude that Respondent has further violated Section 8(a)(1) and (5) of the Act by bargaining directly with employees, requiring them to sign individual agreements consenting to one of two options concerning the issues that were under negotiation with the Union, and by implementing the change in terms and conditions of employment of employees as set forth in the agreements that the employees signed. *Harris-Teeter Supermarkets,* 310 NLRB 216, 217 (1993).

Finally, the evidence also establishes that Respondent changed its prior practice, at least at the Bitely facility, of paying for time spent by employees on postinspections of their buses. Since such changes were not discussed with the Union, Respondent once again has violated Section 8(a)(1) and (5) of the Act by such conduct. I so find.

CONCLUSIONS OF LAW

1. Respondent, FiveCAP, Inc., is and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. General Teamsters Union, Local 406, International Brotherhood of Teamsters, AFL–CIO, is and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material, the Union by virtue of Section 9(a) of the Act, has been, and is the exclusive representative of employees in the below described appropriate unit, for the purposes of collective-bargaining with respect to rates of pay, wages, and other terms and conditions of employment.

The unit is:

> All full-time and regular part-time teacher aides, weatherization laborers, bus drivers, clerks, kitchen aides, drivers of the Tasty Meals program, assistant cooks, program information specialists, county community support service workers, field supervisors/pre-inspectors, post-inspectors, crew leaders, head cooks, Head Start teachers and assistant community workers employed by the Respondent at its facilities in Lake, Manistee, Mason and Newago counties, Michigan; but excluding executive directors, Mason County Director for Head Start, Head Start head teachers, fiscal officers, community support directors, weatherization directors, Head Start administrative assistants, fiscal clerks, Head Start parent education coordinators, Head Start disability service coordinators, guards and supervisors as defined in the Act.

4. By threatening employees with discharge, loss of employment, or other reprisals because of their membership in, support for, or activities on behalf of the Union, or because of their testimony at, or assistance to the Union at an National Labor Relations Board proceeding, or because of the employees engaged in protected concerted activities, by coercively interrogating employees concerning how they voted in a National Labor Relations Board election, or concerning their membership in, support for, or activities on behalf of the Union, or concerning their participation in, and the participation of other employees, in protected concerted activities, by advising employees that it knew how they voted in an National Labor Relations Board election, and by promulgating and maintaining an overly broad no-solicitation, no-distribution rule, Respondent has violated Section 8(a)(1) of the Act.

5. By accelerating the date of acceptance of the resignation of Melissa Larson-Anderson, laying off, moving the office of, and by discharging Dale Smith, by issuing a work evaluation to Marva Taylor which placed her on probation with a recommendation for termination, by discharging Verna Fugere and Tom Belongia, by laying off, refusing to recall and refusing to consider David Monton for the position of weatherization inspector, and by refusing to recall Amanda Lange and Melissa Kukla to their positions as home visit teachers, and by refusing to hire or consider Lange or Kukla for other available positions, because of the employees support for or membership in the Union, and because such employees testified or appeared and assisted the Union at a representation hearing, and because the employees engaged in other protected, concerted activities, Respondent has violated Section 8(a)(1), (3), and (4) of the Act.

6. By laying off and refusing to recall Arthur Burkel, by refusing to recall Karen Sandstedt and Jane Myers to their positions as home visit teachers and refusing to consider Sandstedt and Myers for other available positions, by placing and continuing Ann Walters on probationary status, by changing the hours for which Bruce Kent was paid and issuing him disciplinary letters on September 23 and 27, 1995, because of the employees support for, or membership in the Union, and because they engaged in other protected, concerted activities, Respondent has violated Section 8(a)(1) and (3) of the Act.

7. By unilaterally changing the hours for which drivers were paid at its Lake County center, by implementing changes in terms and conditions of employment with respect to payment for posttrip inspections, whether drivers can take their buses home, and whether drivers can remain on Respondent's property between their morning and afternoon routes, without giving the Union notice and opportunity to bargain, about these changes and/or without bargaining to impasse with respect to those changes, and by engaging in direct dealings with employees and bypassing the Union concerning the above subjects, Respondent has violated Section 8(a)(1) and (5) of the Act.

8. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

9. The Respondent has not violated the Act, in any other manner as alleged in the complaint.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

The normal reinstatement remedy orders that employees be reinstated to their former positions of employment, or if those jobs no longer exist, to substantially equivalent positions. This

remedy is appropriate for discriminatees Tom Belongia, Dale Smith, Verna Fugere, David Monton, and Arthur Burkel.[53]

However, with respect to discriminatees Melissa Kukla, Amanda Lange, Karen Sandstedt, and Jane Myers, a different reinstatement order is appropriate. Since the violation that I have found above of refusing to recall these employees to their home visit jobs, resulted from Respondent's action of eliminating their home start positions at Manistee and Lake County, in order to properly return the situation to the status quo, it is necessary to require Respondent to restore its operations to where it existed prior to the discrimination. *We Can, Inc*., 315 NLRB 170, 174 (1994). Therefore, it is appropriate to order Respondent to restore its prior practice of operating a home visit program at Manistee and Lake counties, and to reinstate these four discriminatees to their former jobs at these facilities. Respondent has not shown that such a remedy would be unduly burdensome. However, Respondent will be permitted to demonstrate at the compliance stage of this proceeding, on the basis of evidence not available at the time of the hearing that such a remedy would be unduly burdensome or otherwise inappropriate or impossible to be carried out. *We Can,* supra. If Respondent is able to make such a showing at the compliance stage, then its reinstatement obligation can be satisfied by reinstating these employees to substantially equivalent positions.

Respondent shall also be ordered to make whole all of the above-named discriminatees for any loss of earnings and benefits suffered as a result of the discrimination against them. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1956), plus interest in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In view of my finding and remedy for Respondent's unlawful refusal to recall Kukla, Sandstedt, Lange, and Myers to their former positions as home start teachers, it is not necessary to order any affirmative remedy for my additional findings of Respondent's subsequent refusal to consider or hire them for other available positions.

However, in the event that my findings with respect to the initial refusal to recall are reversed as noted, I would still conclude that Respondent's refusal to consider or hire these four individuals for other positions was unlawful. In that event an affirmative remedy would be required.

Inasmuch as the record is unclear as to precisely which of the available positions would have been offered to which particular discriminatee,[54] I would leave to the compliance state of this case, the resolution of these issues, *Laro Maintenance Corp*., 312 NLRB 155 (1993), which would also affect the backpay due to them.

It is not clear from the record whether any employees suffered any monetary loss as a result of Respondent's unlawful unilateral changes, or its discriminatory change in its method of calculating pay at Lake County, particularly since the Union and Respondent reached agreement on a new system of calculating pay for all busdrivers, shortly after this discriminatory action. Similarly, while the record reveals that employees at Bitely were told that they would no longer receive pay for postinspection time, the record does not establish whether this policy was applied at other facilities, or in fact whether any employees at Bitely or elsewhere were actually denied pay for this time.

Accordingly, in view of the above, if it is appropriate to order that Respondent make whole its employees for any loss of pay or other benefits caused by its unlawful unilateral changes, plus interest, and leave to the compliance stage the determination of how much, if any, backpay dues is due to employees based on these violations.

It is also appropriate to order Respondent to rescind its unlawful unilateral changes of prohibiting drivers from taking their buses home or remaining on Respondent's property, between their morning and afternoon runs, its refusal to pay drivers for postinspection time, and its individual agreements that it negotiated with its employees regarding the parking of its buses. I shall not recommend that Respondent rescind its unilateral change in payment calculation with respect to the Lake County facility, since that issue was resolved during negotiations with the Union, and was encompassed by the agreement between the parties which coerced drivers at all of its facilities.

Finally, it is appropriate to require Respondent to rescind the disciplinary notices issued to Bruce Kent on September 23 and 27, 1995, as well as the probationary status conferred upon Ann Walters on June 9 and July 18, and on Marva Taylor on May 1, 1995.

Based upon the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended[55]

ORDER

The Respondent, FiveCAP Incorporated, Scottvile, Michigan, and at all its other facilities in Michigan, its officers, agents, successor, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with discharge, loss of employment, or other reprisals, because of their membership in, support for, or activities on behalf of General Teamsters Union, Local 406, International Brotherhood of Teamsters, AFL–CIO (the Union) or because of their testimony at, or assistance to the Union at a National Labor Relations Board hearing, or because the employees engage in protected concerted activities.

(b) Coercively interrogating its employees concerning how they voted in a Board election, or concerning their membership in, support for, or activities on behalf of the Union, or concerning their participation in, or the participation of other employees, in protected concerted activities.

(c) Advising its employees that it knows how they voted in a Board election.

(d) Promulgating, or maintaining an overly broad no-solicitation, no-distribution rule.

(e) Discharging, laying off, refusing to recall, refusing to hire, or consider for hire, or moving the office of employees, placing employees on probation, changing the hours for which

[53] While the evidence reflects that Respondent sent a letter of reinstatement to Monton and Burkel, at the time of the hearing herein, neither discriminatee had received such letter. Therefore, the question of the effect of such letter on the rights of Burkel and Monton to reinstatement and the amount of backpay due them, will be resolved at the compliance stage of this proceeding.

[54] I note for example that in some instances more than one discriminatee had expressed interest in the same available position.

[55] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

employees are paid, and issuing disciplinary letters to employees, or accelerating the date of acceptance of the resignation of employees, or in any like or related manner discriminating against employees, because they engage in activities on behalf, or in support of the Union, or other protected concerted activities, or because they testify at, or assist the Union at a Board proceeding.

(f) Bypassing the Union or bargaining directly with the employees in the above described unit, with respect to wages, hours, and other terms and conditions of employment.

(g)Implementing changes in hours for which drivers are paid, payment for post trip inspections, whether drivers can take their vehicles home or remain on Respondent's property between their morning and afternoon routes, or in other terms and conditions of employment of employees in the unit, without providing the Union notice and an opportunity to bargain and without first bargaining to impasse.

(h) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer employees Tom Belongia, Dale Smith, Verna Fugere, David Monton, and Arthur Burkel immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority, or rights and privileges previously enjoyed.

(b) Restore its home start program at its Manistee and Lake County facilities, and offer employees Melissa Kukla, Karen Sandstedt, Amanda Lange, and Jane Myers immediate and full reinstatement to their former jobs at these facilities, without prejudice to their seniority or other rights and privileges previously enjoyed, as described above in the remedy section of this decision.

(c) Make whole Belongia, Smith, Fugere, Monton, Burkel, Kukla, Sandstedt, Lange, Myers, and Bruce Kent for any loss of earnings and benefits suffered by reason of the discrimination against them, as well as all employees for any losses suffered by reason of Respondent's unlawful unilateral changes, plus interest as described in the remedy section of this decision.

(d) Rescind the work rules implemented by Respondent prohibiting busdrivers from taking their buses home or from remaining on Respondent's property between their morning and afternoon routes, and rescind the individual agreements negotiated with employees with respect to the parking of buses.

(e) Restore its practice of paying drivers for time spent post inspecting their buses.

(f) Rescind its disciplinary warnings issued to Bruce Kent on September 23 and 27, 1995, its actions in placing Ann Walters on probationary status, and remove from his files any reference to these actions, as well as to the discharges or refusals to recall Tom Belongia, Dale Smith, David Monton, Arthur Burkel, Verna Fugere, Amanda Lane, Melissa Kukla, and Karen Sandstedt, and notify each of these employees in writing that this has been done and that the discharges, warnings, or probationary letters, shall not be used against them in any way.

(g) Rescind its overlybroad no-solicitation, no-distribution rule.

(h) Restore the office of Dale Smith and Tom Belongia to its previous location on the main floor.

(I) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(j) Post at its main office in Scottville, Michigan and at all its other facilities in Michigan, copies of the attached notice marked "Appendix."[56] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees, are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendence of these proceedings, the Respondent has gone out of business or closed the facility involved in this proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since May 4, 1995.

(k) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(l) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that all violations alleged in the complaint but not found are dismissed insofar as it alleges violations of the act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten our employees with discharge, loss of employment, or other reprisals, because of their membership in, support for, or activities on behalf of General Teamsters Union, Local 406, International Brotherhood of Teamsters, AFL–CIO (the Union) or because of their testimony at or assistance to the Union at a Board hearing, or because the employees engaged in protected, concerted activities.

WE WILL NOT coercively interrogate our employees concerning how they voted in a Board election, or concerning their membership in, support for, or activities on behalf of the Union, or concerning their participation in, or the participation of other employees, in protected concerted activities.

WE WILL NOT advise our employees that we know how they voted in a Board election.

WE WILL NOT promulgate or maintain an overly broad no-solicitation, no-distribution rule.

WE WILL NOT discharge, lay off, refuse to recall, refuse to hire, or consider for hire, or move the office of our employees,

[56] If this Order is enforced by a Judgment of the United States court of appeals, the words in the notice reading "Posted by order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

place employees on probation, change the hours for which employees are paid, issue disciplinary letters to employees, or accelerate the date of acceptance of the resignation of employees, or in any like or related manner discriminate against our employees, because they engage in activities on behalf, or in support of the Union, or other protected concerted activities, or because they testify at or assist the Union at a Board proceeding.

WE WILL NOT bypass the Union, or bargain directly with our employees with respect to wages, hours, and other terms and conditions of employment.

WE WILL NOT implement changes in hours for which drivers are paid, payment for posttrip inspections, whether drivers can take their vehicles home or remain on our property between their morning and afternoon routes, or in other terms and conditions of employment of our employees, without, providing the Union notice and an opportunity to bargain and without first bargaining to impasse.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer employees Tom Belongia, Dale Smith, Verna Fugere, David Monton, and Arthur Burkel immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority, or rights and privileges previously enjoyed.

WE WILL restore our home start program at our Manistee and Lake County facilities, and offer employees Melissa Kukla, Karen Sandstedt, Amanda Lange, and Jane Myers immediate and full reinstatement to their former jobs at these facilities, without prejudice to their seniority or other rights and privileges, previously enjoyed.

WE WILL make whole Belongia, Smith, Fugere, Monton, Burkel, Kukla, Sandstedt, Lange, Myers, and Bruce Kent for any loss of earnings and benefits suffered by reason of the discrimination against them, as well as all employees for any losses suffered them, by reason of our unlawful unilateral changes, plus interest.

WE WILL rescind the work rules that we have implemented prohibiting busdrivers from taking their buses home or from remaining on our property between their morning and afternoon routes, and rescind the individual agreements that we have negotiated with our employees with respect to the parking of buses.

WE WILL restore our practice of paying drivers for time spent postinspecting their buses.

WE WILL rescind our disciplinary warnings issued to Bruce Kent on September 23 and 27, 1995, our actions in placing Ann Walters and Marva Taylor on probationary status, and remove from our files any reference to these actions, as well as to the discharges or refusals to recall Tom Belongia, Dave Smith, David Monton, Arthur Burkel, Verna Fugere, Amanda Lange, Melissa Kukla, Karen Sandstedt, and Jane Myers, and notify each of these employees in writing that this has been done and that the discharges, warnings, or probationary letters, shall not be used against them in any way.

WE WILL rescind an overly broad no-solicitation, no-distribution rule.

WE WILL restore the office of Dale Smith and Tom Belongia to its previous location on the main floor.

FIVECAP, INCORPORATED